95-955

No. _____

Supreme Court, U.S.
FILED
DEC 18 1995
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In The

Supreme Court of the United States

October Term 1995

DANIELLE GORDON,

Petitioner,

- v. -

DONNA SHALALA, Secretary of the
Department of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES ROBERT, ESQ.
Counsel of Record
Attorney for Petitioner
100 Merrick Road—508W
Rockville Centre, New York 11570
(516) 766-7700

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

8 pp

QUESTIONS PRESENTED

I.

Did the Court of Appeals for the Second Circuit fail to follow the standards enunciated by this Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by not requiring SSA Commissioner Chater to amend her "Jackson" SSI regulation, 20 C.F.R. § 416.1130 (b), whereby the holding of *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982) was codified in a federal regulation that has been applied in computing monthly SSI benefits of SSI recipients residing in the Seventh Circuit States of Indiana, Illinois, and Wisconsin, but has not been applied to compute SSI benefits of residents residing in any other Circuit States, in a federal program that Congress intended was to have a uniform standard applied equally in all 50 States?

II.

Did the Court of Appeals for the Second Circuit fail to follow the standards enunciated by this Court in *Georgetown Hospital v. Bowen*, 488 U.S. 204 (1988) by deferring to the legal standard created by Adminstrative Appeals Judge Larry Banks who implemented the SSA Commissioner's "nonacquiescence policy" by applying his February 25, 1992 *Gordon III* interpretation of the "*Ruppert* Acquiescence Ruling" in computing Danielle's monthly SSI income, rather than applying the Secretary's duly promulgated regulations?

III.

Did the Court of Appeals for the Second Circuit err by not applying the Secretary's September 8, 1992 Social Security Ruling SSR 92-8p, in which Secretary Sullivan belatedly conceded that *Hickman v. Bowen*, 803 F. 1103 (5th Cir. 1986) and *Ceguerra v.*

Sullivan, 933 F. 2d 735 (9th Cir. 1991) had been correctly decided, because Congress had never intended that "in kind" loans of "support and maintenance" were to be counted as income of SSI recipients in any of the 50 States?

IV.

Should the federal government have been estopped from arguing that the Seventh Circuit "incorrectly" decided *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982) because Solicitor General Lee advised this Court that *Jackson* was correctly decided in the government's October, 1983 Brief in *Guigno v. Schweiker*, 464 U.S. 94 (1983), Deputy Assistant Attorney General Carolyn Kuhl advised a July 25, 1985 House Judiciary Subcommittee (which was considering legislation to end Secretary Heckler's nonacquiescence policy) that the Secretary had ended her pre-July 25, 1985 nonacquiescence policy and *Jackson* was *not* a "nonacquiescence" case, and SSA Chief Counsel Donald Gonya informed the Administrative Conference of the United States (ACUS) by a March 23, 1987 letter that the Secretary had "acquiesced" to the *Jackson* holding by promulgating a regulation.

LIST OF PARTIES

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DANIELLE GORDON,

Petitioner,

- v. -

DONNA SHALALA, Secretary of the
Department of Health and Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Danielle Gordon, petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the decision of May 22, 1995, for which a Petition for Rehearing was denied on September 18, 1995, and a judgment entered as a mandate on September 26, 1995. Docket No. 94-6011.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of New York, dated November 12, 1993, cv. 89-412, 90-1183, and 93-3272, awarded judgment to the petitioner. The unreported decision is reproduced in the Appendix filed herewith ("App.") at App D.

The Opinion of the Court of Appeals decided on May 22, 1995, Docket No. 94-6011,(Lumbard, Van Graafeiland, and Winter)

reversed the judgment of the District Court and remanded the case to the District Court, is reported at 55 F.3d 101 (2d Cir. 1995), and is reproduced at App. C.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C.§ 1254(1).

The Judgment sought to be reviewed was entered as a mandate on September 26, 1995.

STATUTES INVOLVED

Pertinent provision of the Supplemental Security Income program, 42 U.S.C. § 1382a (A) is reproduced at App. E.

STATEMENT OF THE CASE

Petitioner, Danielle Gordon, is a disabled Supplemental Security Income (SSI) recipient whose monthly SSI benefits were reduced because the Social Security Administration (SSA) Commissioner determined that she had received "in kind" income in the form of a rent subsidy from her non-legally responsible mother-landlord. Judge Spatt determined that the SSA Commissioner had not correctly applied the SSI income standards as established in the Secretary's regulations as interpreted in *Ruppert v. Bowen*, 871 F. 2d 1172 (2d Cir. 1989) which followed, without adopting, the holdings in *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982) and *Hickman v. Bowen*, 803 F. 2d 1103 (5th Cir. 1986).

The Second Circuit reversed Judge Spatt's decision and held that the SSA Commissioner had correctly applied the SSI income standards in computing Danielle's SSI benefits because the Court deferred to the interpretation of the "Ruppert Acquiescence Ruling" as made by the Commissioner's Administrative Appeals Judge

(AAJ) Larry Banks. Secretary Sullivan had issued the "Ruppert Acquiescence Ruling" on July 16, 1990, after the Secretary's appellate counsel had determined that the Second Circuit had "incorrectly" decided the *Ruppert* decision when it relied upon the "incorrectly" decided Seventh Circuit *Jackson* decision. In *Gordon*, AAJ Banks had interpreted the *Ruppert* Acquiescence Ruling by incorporating the *Hickman* Acquiescence Ruling, which had been issued after the Secretary's appellate counsel determined that the Fifth Circuit had "incorrectly" decided *Hickman v. Bowen*, 803 F. 2d 1103 (5th Cir. 1986). However, subsequent to AAJ Banks rendering his decision, Secretary Sullivan rescinded the *Hickman* Acquiescence Ruling. The *Ruppert* Acquiescence Ruling is attached as App. F.

Appellee Gordon unsucessfully argued below that the Court affirm Judge Spatt's decision and order the Secretary to promulgate an amended "Jackson" regulation to incorporate the Second Circuit *Ruppert* holding. The Second Circuit rejected the appellee's argument, reversed Judge Spatt's decision, and concluded that AAJ Banks' interpretation of the *Ruppert* Acquiescence Ruling was consistent with the Second Circuit *Ruppert* Decision.

A. Facts

On April 29, 1986, Danielle Gordon, a spastic quadriplegia with cognitive impairments, applied for SSI benefits as an 18 year old disabled adult. Because Danielle had no cash income when she applied for SSI benefits, her non-legally responsible mother-landlord "loaned" her support and maintenance (food and shelter) until she received her SSI cash monthly benefits.

HHS Secretary Bowen granted her SSI application, but reduced Danielle's federal monthly SSI benefits by one third because of her receipt of "support and maintenance" from her landlord-mother. The Secretary determined not to apply 20 C.F.R. § 416.1132 (c)(2) which would have established Danielle as a resident in her own fiscal

household because she had rental liability to her landlord-mother. Rather, the Secretary applied 20 C.F.R. § 416.1140, whereby the Secretary counts as "in-kind income" the support and maintenance (food and shelter) Danielle received from her parents while Danielle was awaiting receipt of her SSI cash grant. Danielle appealed the decision to reduce her benefits because of the receipt of alleged "in-kind" income.

Once Danielle received her reduced SSI cash benefits of $241 per month, Danielle's mother-landlord monthly charged her $100 for rent and $100 for food. The remaining $41 monthly SSI cash was used for the miscellaneous needs of an 18 year old.

However, the Secretary determined that the "market value" of the rent that Danielle received was valued at $406 per month for which she only paid $100 per month. The Secretary concluded that Danielle was receiving a private rent subsidy of $306 per month ($406-$100). Pursuant to 20 C.F.R. § 416.1131, the Secretary reduced Danielle's SSI benefits by one third based on her receipt of private rent subsidy from her landlord-mother. Since Danielle did not reside in a Seventh Circuit State, the Secretary did not apply to her facts the "Jackson" regulation, 20 C.F.R. § 416.1130 (b).

Over the next years, Danielle appealed the Secretary's decision and exhausted her administrative remedies. The Secretary agreed to reevaluate her case after remands from the federal court actions *Gordon I* v. *Secretary* and *Gordon II v. Secretary*. After each remand, the Secretary applied a different legal standard to the facts of her case. These changing standards were based on the Secretary's alleged acquiescence to Judge Wexler's October 9, 1987 decision in *Ruppert-Stone v. Bowen*, 671 F. Supp. 151 (E.D.N.Y. 1987), the Second Circuit's March 29, 1989 decision in *Ruppert v. Bowen*, 871 F. 2d 1171 (2d Cir. 1993), the July 16, 1990 *Ruppert* Acquiescence Ruling, and a February 5, 1992 Second Circuit *Stone IV* Agreement.

In his October 9, 1987 *Ruppert-Stone v. Bowen*, 671 F. Supp. 151 (E.D.N.Y. 1987) decision, Judge Wexler adopted the *Hickman v. Bowen*, 803 F. 2d 1377 (5th 1986) decision that had held that the Secretary was incorrectly counting "in kind loans" of support and maintenance as countable income in reducing SSI applicant's SSI benefits. The Secretary's appellate counsel had not filed a *Hickman* petition of writ of certiorari and also determined *not* to appeal Judge Wexler's *Ruppert-Stone* holding.

On November 14, 1988, Secretary Bowen issued a "Hickman Acquiescence Ruling" by which the Secretary's appellate counsel determined that the Fifth Circuit had "incorrectly" decided *Hickman v. Bowen*. The *Hickman* Acquiescence Ruling provided that the *Hickman* holding would only be applied to SSI recipients in the Fifth Circuit States.

On May 15, 1991, the Ninth Circuit decided *Ceguerra v. Sullivan*, 933 F. 2d 735 (9th Cir. 1991) and followed *Hickman* and also decided that Congress did not intend that an in-kind loan of support and maintenance was to be considered income to reduce SSI benefits. The Secretary's appellate counsel determined not to file a petition for a writ of certiorari.

In *Gordon II*, since Judge Wexler had relied upon *Hickman* in his unappealed *Ruppert-Stone* holding, and Secretary Bowen had issued the *Hickman* Acquiescence Ruling, Secretary Sullivan determined not to apply the *Hickman-Ruppert-Stone* standard to Danielle's facts. However, on February 5, 1992, at a Second Circuit *Stone IV v. Sullivan* pre-argument Conference, Secretary Sullivan agreed to apply Judge Wexler's *Ruppert-Stone* standard retroactively to Matthew Stone's case and to publish the *Stone IV* standard.

On February 25, 1992, notwithstanding the Second Circuit February 5, 1992 *Stone IV* Agreement, Secretary Sullivan's Administrative Appeals Judge Larry Banks rendered the *Gordon III*

decision and applied the *Ruppert* Acquiescence Ruling. However, AAJ Banks in applying the *Ruppert* Acquiescence Ruling, incorporated the *Hickman* Acquiescence Ruling, and counted as income a loan of $306 of in-kind rent from Danielle's landlord-mother. Danielle appealed that *Gordon III* decision which is the decision that Judge Spatt reversed.

On September 8, 1992, after *Gordon III* was filed, Secretary Sullivan issued SSR 92-8p which adopted the *Hickman* and *Ceguerra* holdings with an admission that this had been the correct legal standard. The Secretary advised the public that the *Hickman* and *Ceguerra* holdings would be prospectively applied in all 50 States. However, the Secretary advised the public that the SSR 92-8p standard would be applied retroactively only in the Fifth and Ninth Circuits. 57 FR 40918 (September 8, 1992). On September 8, 1992 Secretary Sullivan formally rescinded the *Hickman* Acquiescence Ruling. 57 FR 40919 (September 8, 1992).

B. Proceedings Below

After Danielle exhausted her administrative remedies, she filed *Gordon I v. Secretary*, cv 89-412. *Gordon I* was remanded in order for the Secretary to apply the legal standards established in the March 29, 1989 *Ruppert v. Bowen*, 871 F. 2d 1172 (2d Cir. 1989) decision. On remand, the Secretary did not apply the Second Circuit *Ruppert* standards because the Secretary's appellate counsel had determined that *Ruppert* had been "incorrectly" decided. On April 9, 1990 *Gordon II v. Secretary* was filed.

On July 16, 1990, Secretary Sullivan issued the *Ruppert* Acquiescence Ruling. 55 FR 28947 (July 16, 1990). The Secretary advised the public that *Ruppert* had been "incorrectly" decided, but would be followed in the Second Circuit. *Gordon II* was remanded in order for the Secretary to apply the *Ruppert* Acquiescence Ruling to the *Gordon* facts.

On February 25, 1992, Secretary Sullivan's Administrative Appeals Judge Larry Banks rendered the Secretary's *Gordon III* Appeals Council decision and applied the *Ruppert* Acquiescence Ruling to the facts. However, in his interpretation of the *Ruppert* Acquiescence Ruling, AAJ Banks grafted in the *Hickman* Acquiescence Ruling and counted as income a $306 "loan" of rent by the landlord-mother. Plaintiff appealed that decision and filed *Gordon III v. Shalala*.

On November 12, 1993, having been advised of the Secretary's September 8, 1992 issuance of SSR 92-8p and the rescission of the *Hickman* Acquiescence Ruling, Judge Spatt reversed AAJ Banks' *Gordon III* decision. Judge Spatt applied the Second Circuit *Ruppert* standards to the facts and held:

> To this Court it does "fly in the face of reality" to conclude that the rent subsidy of $306.00 or even the presumed value of $134.00 per month was actually available to the plaintiff and thus a economic benefit to her. *The plaintiff only received $241 in benefits. How can could she use the $306.00 rent subsidy?* The figures calculated by the Secretary, according to the formula in the *Ruppert* Acquiescence ruling, as economic benefits to the plaintiff during those months, *are not grounded in reality. They are just abstract calculations*. Their abstractness is underscored by the Secretary's argument that during the months at issue the plaintiff would have been entitled to a benefit ranging from $324.00 in 1986 to $357.00 in 1990. According to the record— the reality—the plaintiff actually received only $241.00 per month. That was the base figure from which to calculate her real purchasing power. Slip Opinion, 14. (Emphasis added).

Secretary Shalala appealed Judge Spatt's decision. On May 22, 1995, the Second Circuit reversed Judge Spatt's decision and held that Administrative Appeals Judge Banks' interpretation of the *Ruppert* Acquiescence Ruling was not inconsistent with the March 29, 1989 *Ruppert* decision. The Second Circuit affirmed AAJ Banks' decision which included AAJ Banks' imputation of a "loan" of market value of rent, and approved the complicated mathematical formula that AAJ Banks had created in his interpretation of the *Ruppert* Acquiescence Ruling. The Second Circuit also rejected the appellee's request that the *Ruppert* Acquiescence Ruling be promulgated as a regulation as was the Seventh Circuit *Jackson* holding upon which the *Ruppert* Acquiescence Ruling was based.

REASONS FOR ALLOWING THE WRIT

In 1972, when President Nixon signed into law the enabling SSI legislation, the Congress and the President intended that the federal government would relieve the States of the cash burden of providing welfare benefits to the "worthy poor" aged, blind, and disabled who could not earn sufficient work quarters to secure social security disability benefits. Congress intended that the Secretary establish one set of federal *uniform* and *efficient* legal standards to administer the SSI program equally to residents of all 50 States.

Because the Attorney Generals of Presidents Ford, Carter, Reagan, Bush, and Clinton ratified the HHS Secretary's appellate counsels' implementation of an HHS nonacquiescence policy, the promise of the uniformity and efficiencies of the SSI program did not occur. Different legal standards were applied in different Circuits because Executive Branch counsel, acting as de facto Supreme Court Justices, determined which Circuit Court cases had been "correctly" decided and to be followed and which Circuit Court cases had been "incorrectly" decided and to be followed only in that Circuit's States.

As to the "incorrectly" decided Circuit Court decisions, a second decision was made by Executive Branch counsel not to petition the Supreme Court for a writ of certiorari. The decision not to appeal an "incorrectly" decided decision was out of fear that a writ may be granted and the Supreme Court may determine that the "incorrect" Circuit decision had correctly interpreted the intent of Congress. If that occurred, then the "incorrectly" decided Circuit Court legal standard would be applied in all 50 States. See *Nonacquiescence by Federal Administrative Agencies*, Esteicher & Revesz, 98 Yale L.J. 679 (1989). *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 Yale L.J. 801 (1990). *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. Pitt. L. Rev. 399 (1989). *The Constitutional Case Against Intracircuit Nonacquiescence*, Coenan, 75 Minn. L. Rev. 1339 (1991). *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987). *The Politics of Nonacquiescence: The Legacy of Stieberger v. Sullivan*, 46 West SRRS 821 (1995).

Gordon III provides the Supreme Court with an opportunity to review the new and independent Social Security Administration's "nonacquiescence" policies and procedures as applied to an SSI recipient because SSA Commissioner Chater has adopted, without exception, the nonacquiescence policies of Secretary Shalala. The Secretary's SSI nonacquiescence policy has resulted in a hodge podge of different standards that are applied to legally *defenseless* aged, blind, and disabled citizens in the 50 States. Only those pitifully few SSI recipients who have access to legal counsel, have the opportunity to challenge SSA Commissioner Chater's nonacquiescence policy in order to have the most favorable legal standards that are applied in other circuits, applied to the facts of their individual cases. See *Application of Circuit Court Law*. 20 C.F.R. § 416.1485 (1990).

If the Supreme Court granted the petition, the Court could determine whether Attorney General Reno and SSA Commissioner Chater have correctly applied this Court's *Chevron* and *Georgetown Hospital* standards in administering the SSI program and equally enforcing the SSI regulations in all 50 States. In *Gordon*, the Second Circuit blindly deferred to the standards established by SSA Commissioner's Administrative Appeals Judge Larry Banks who had determined that incorrect decisions had been made by the Second Circuit in *Ruppert*, the Seventh Circuit in *Jackson*, the Fifth Circuit in *Hickman*, and the Ninth Circuit in *Ceguerra*.

Without this Court's review, the SSI program will continue to aimlessly drift away from the enabling Act intent of the Congress and President Nixon that there be a federal uniform SSI program with efficient legal standards equally applied in all 50 States. Given the paucity of SSI cases that percolate to the Circuit Courts, the Court should consider granting the writ as the Court's decision will affect the legally defenseless SSI recipients who reside in all 50 States for whom SSA Commissioner Chater and Attorney General Reno are not equally or efficiently administering the SSI program with one uniform federal standard as intended when the Congress enacted the remedial SSI program in 1972.

I. THE COURT OF APPEALS DECISION CONFLICTS WITH SUPREME COURT PRECEDENT IN *CHEVRON U.S.A. V. NATURAL RESOURCES DEFENSE COUNCIL, INC.*, 467 U.S. 837 (1984).

The Second Circuit *Gordon* decision conflicts with this Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the Circuit did not apply the *Chevron* standards to an interpretation of an ambiguous statute. This case involves the extraordinary fact that the Secretary had promulgated two different regulations to be applied in a federal program which was to have had only one uniform set of federal

standards equally applied in all 50 States. By proper application of the *Chevron* standards, the Second Circuit could have resolved that conflict as applied to Danielle Gordon.

The fact that there now exists two conflicting regulations establishing two different legal standards is a result of the Secretary's appellate counsel, HHS General Counsel Juan del Real and his Assistant Counsel Larry Banks, determination in 1982 that the Seventh Circuit had "incorrectly" decided *Jackson v Schweiker*. As a result of the implementation of the Secretary's nonacquiescence policy, when on April 21, 1986 Secretary Bowen promulgated the "Jackson" regulation, it was limited to application to SSI recipients who resided in the Seventh Circuit States. 51 FR 13487 (April 21, 1986).

After the March 29, 1989 Second Circuit *Ruppert* Court followed, but did not adopt, *Jackson*, Secretary Bowen did not apply the *Chevron* principles and amend the "Jackson" regulation. Rather, the Secretary's appellate counsel issued the *Ruppert* Acquiescence Ruling. Thus, contrary to *Chevron* principles, the "law" that was to be applied in the Second Circuit was not based on a regulations duly promulgated pursuant to the Administrative Procedure Act, but was based on the Secretary's appellate counsels' opinion that the Second Circuit, like the Seventh Circuit, had "incorrectly" interpreted the intent of Congress as to the standard used to compute SSI income.

Because the *Chevron* principles were not applied when the *Ruppert* Acquiescence Ruling was issued, the Second Circuit deferred to the opinion of AAJ Banks. Secretary Sullivan had delegated to AAJ Banks, who had been the Secretary's Assistant Counsel who had determined in 1982 that *Jackson* had been "incorrectly" decided, the Executive Branch authority not only to adjudicate *Gordon III*, but to create the mathematical formula to be used in applying the *Ruppert* Acquiescence Ruling to the *Gordon* facts in the Second Circuit. As a result of AAJ Banks' administrative "rule making" authority as implemented in *Gordon III*, the

mathematical formula used in *Gordon III* never was subjected to the public rigors of the Administrative Procedure Act.

In *Chevron*, this Court established the standards to be applied when the Judiciary reviews Executive Branch standards. When interpreting an ambiguous federal statute that is not clear on its face, the Court is to review the Secretary's regulations. In *Gordon* both parties agree that the statutory "in kind" standard is ambiguous on its face.

However, in applying the *Chevron* standards, the parties have disagreed on whether the Executive Branch's interpretation of the ambiguous statute was properly made by the issuance of the *Ruppert* Acquiescence Ruling with the administrative gloss that AAJ Banks placed on the *Ruppert* Acquiescence Ruling when he created the *Gordon III* standard. The appellee argued below that this was an improper standard not promulgated pursuant to the APA. However, the government successfully argued to the Second Circuit that no public rule-making was needed because this was only an interpretation of the "*Jackson*" regulation, and, therefore, was not a substantive rule.

Application of the *Chevron* principles is made difficult in this case because of the toxic legacy of the Secretary's nonacquiescence policy which has resulted in two different regulations which SSA Commissioner Chater and Attorney General Reno admit have not been applied equally in a federal program that was to have a uniform federal standard applied in all 50 States. Seventh Circuit SSI recipients have the regulatory protection of the *Jackson* regulation. Second Circuit SSI recipients, because of the *Ruppert* Acquiescence Ruling, have the benefit of the *Jackson* standard, but do not have the protections of a regulation. The *Ruppert* Acquiescence Ruling could be rescinded at the whim of Administrative Appeals Judge Larry Banks or any Executive Branch official.

Danielle did not have the protection of the *Chevron* principles because on April 21, 1986, the *Jackson* rule was promulgated as a regulation, but Secretary Bowen determined that the regulation would only apply in the States of the Seventh Circuit. As a result, when Danielle Gordon applied for SSI benefits on April 29, 1986, the *Jackson* regulation was not applied to her case.

Had the *Jackson* regulation been applied to Danielle's case, she would received the full SSI payment without a one-third reduction in the monthly cash benefit. This is because Danielle would have been found to have incurred rental liability and determined to be residing in her own fiscal household pursuant to 20 C.F.R.§ 416.1132 (c)(2). If the "*Jackson*" regulation had been applied to her facts, although she was receiving an "in kind" rent subsidy from her landlord-mother in the amount of $306 per month as determined by Secretary Bowen (the Secretary's market value of rent of $406 minus the rent charged of $100), her SSI benefits would not have been reduced by one third because the market value rent ($406) was more than 100 % of her monthly cash benefits of $241 per month.

The appellee argued unsuccessfully below that since the *Ruppert* Acquiescence Ruling was modeled after the *Jackson* regulation, that it was a substantive rule that should have been promulgated pursuant to the Administrative Procedure. The Second Circuit rejected this argument and concluded that the *Ruppert* Acquiescence Ruling was an interpretative rule, rather than a substantive rule:

> Although we did not require adoption of those regulations as a matter of law, we did suggest that they were reasonable. *We now hold that they are acceptable. Gordon* slip opinion at 4304. (Emphasis added).

The appellee argues that if the Second Circuit had applied the *Chevron* principles, the Court would have concluded that the *Ruppert* Acquiescence Ruling was a substantive rule and not an

interpretative rule. Since the substantive rule process was applied to the Seventh Circuit *Jackson* holding, the appellee argues that it was illogical for the Second Circuit not to have applied the *Jackson* substantive rule-making process to the *Ruppert* holding.

Appellee Gordon's argument is supported by the March 23, 1987 *Jackson* position taken by SSA Chief Counsel Gonya in a letter to the Administrative Conference of the United States (ACUS) that was reviewing the HHS nonacquiescence policy. Chief Counsel Gonya advised ACUS that the Secretary did acquiesce to Circuit Court rulings which involved the promulgation of a regulation:

> Only occasionally is the rulemaking function involved in the Social Security acquiescence policy when, for instance a court requires the Secretary to issue regulations. See, for example, *Pulido v. Heckler*, 758 F. 2d 503 (10th Cir. 1985); *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982; *Jackson v. Heckler*, 581, 581 F. Supp. 871 (N.D. Ind. 1984); *Pulido v. Heckler*, 568 F. Supp. 627 D. Co. 1983). Unless the court's order is reversed or stayed on appeal, *the agency, of course, complies with such a court order*. Emphasis Added. See Record on Appeal, Document secured from ACUS pursuant to a FOIA request. Attached as App. H.

A facial reading of SSA Chief Counsel Gonya's letter to ACUS would be that the *Jackson* regulation had been applied in all 50 States. In her Petition for Rehearing, the appellee cited the *Gonya* letter, which was in the Circuit Record, and respectfully submitted that the Second Circuit erred in its overly narrow reading of *White v. Shalala*, 7 F. 3d 296 (2d Cir. 1993) and its holding that an Acquiescence Rule is only an interpretative rule. The general rule on acquiescence rulings is that although they "*do not have the force and effect of the law*, they constitute Social Security Administration

interpretations of its own regulations and statute which it administers." As cited in *Gordon*. (Emphasis added).

However, the *Ruppert* Acquiescence Ruling is an exception to the general *White* holding because it is based on the *Jackson* regulation. Petitioner argues that, using *Chevron* principles, *White* supports her position that the *Ruppert* Acquiescence Ruling should have been promulgated as a substantive regulatory rule, like *Jackson*:

> The central question is essentially whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights or duties *in what amounts to a legislative act. White* as per the excerpt in *Gordon*. (Emphasis added).

When the Secretary promulgated the *Jackson* regulation pursuant to the APA, the Secretary established by "legislative act" a substantive rent income rule which the Secretary uses to compute the SSI benefits of Indiana, Illinois, and Wisconsin SSI recipients. Now that the Second Circuit has determined that the same *Jackson* regulatory standard should be applied to compute New York, Connecticut, and Vermont SSI benefits, the Secretary's issuance of the *Ruppert* Acquiescence Ruling was the *same* "legislative act" that should have been codified pursuant to the APA to assure that the agency complies with the regulation. See the March 23, 1987 *Gonya* letter.

In summary, the petitioner argues pursuant to this Court's *Chevron* standards, since the enabling statute is not clear on its face, a substantive rule is needed. Since the *Jackson* regulation is a substantive rule, so too is the *Ruppert* Acquiescence Ruling in order the SSI regulations are implemented equally without any administrative gloss that had not been subjected to public rule-making. This Court should grant the petition in order that the

petitioner can argue that SSA Commissioner Chater should comply with *Chevron* principles and amend the *Jackson* regulation to include the Second Circuit States as well as all of the other 50 States.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH SUPREME COURT PRECEDENT IN *GEORGETOWN HOSPITAL v. BOWEN*

In *Georgetown Hospital v. Bowen*, 488 U.S. 204 (1988), this Court established the standard whereby the Judiciary is to defer to the Secretary's duly promulgated regulations, but not defer to the Secretary's appellate counsel's litigation strategy. In *Gordon*, the panel deferred not to the Secretary's regulation, but to the Secretary's counsel's litigation strategy not to seek a regulatory amendment to clarify for the public the Secretary's substantive "in kind" income rule that was to be applied in the Second Circuit.

In *Georgetown*, Justice Kennedy explained the Judiciary's deference standard to Executive Branch appellate counsel:

> ... (w)e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress *has delegated to the administrative official and not the appellate counsel* the responsibility for elaborating and enforcing statutory commands. *Id.* at 212. (Emphasis added).

The *Jackson* regulatory history is illustrative of the need for SSA Chater to comply with the APA, and not rely upon the litigation strategy of her counsel. Secretary Schweiker's appellate counsel in *Jackson* was HHS General Counsel Juan del Real and his Assistant Counsel Larry Banks, SSA Commissioner Chater's present AAJ. After they had unsuccessfully argued that the Seventh Circuit had "incorrectly" decided *Jackson*, they decided not to petition for a writ of certiorari. Rather, they determined to only apply the *Jackson*

holding to SSI recipients who made the *Jackson* argument who were aware of the Seventh Circuit standard.

However, on January 6, 1984, the *Jackson* District Court rejected Assistant Counsel Banks' litigation strategy, and required the Secretary to promulgate a regulation pursuant to the APA. Chief Judge Sharpe explained why he required Secretary Heckler to promulgate a regulation:

> There is simply no basis for assuming internal operations manual are generally available. Furthermore, *the Secretary has not advanced any compelling reason why the regulation should not be amended*. Therefore, this court will require an amendment to the challenged regulation. *Jackson v. Schweiker*, 581 F. Supp. 871, 873 (N.D. Ind. 1984). (Emphasis added).

Although Secretary Bowen did promulgate a regulatory amendment, this regulatory amendment was limited only to the Seventh Circuit states. *Gordon III* is the toxic legacy of Secretary Bowen's April 21, 1986 decision to limit the regulatory amendment to three States. As evidenced by the *Gordon III* decision, SSA Commissioner Chater and the new and independent SSA Board are in 1995 administering a national program, which President Nixon and the Congress intended was to have one set of uniform standards efficiently administered by the SSA, with two different regulatory standards.

The *Gordon* litigation saga is intertwined with the still unfinished *Ruppert* litigation that now spans the Administrations of Presidents Carter, Reagan, Bush, and Clinton because of the tortured twists and turns of the federal government's litigation strategy and its ever changing legal standards. Appellant *Ruppert* was one of the plaintiffs in *Glasgold v. Califano*, 558 F. Supp. 129 (E.D.N.Y.

1982), aff'd., *Rothman v. Schweiker*, 706 F. 2d 407 (2d Cir. 1983), cert. pet. den. *Guigno v. Schweiker*, 464 U.S. 984 (1983).

In his January 10, 1982 *Ruppert I* remand order, Judge Pratt addressed the issue of what information the SSA must provide SSI applicants when determining the standards to compute benefits:

RE: Ruppert v. HHS

> Plaintiff has amended his complaint to request a declaratory judgment requiring defendant to reform his procedures to comply with the Privacy Act. Specifically he wants defendant to fully inform claimants of the purpose of the information requested, the specific definitions used by Social Security and the effect of answers on benefit amounts. In *Glasgold v. HHS* Judge Pratt ruled that HHS was not required to provide written explanations of its definitions etc. Therefore, plaintiff is currently requesting that oral explanations be required instead (whether only upon request or not is not clear). *Plaintiffs assertion that a distinction should be made between oral and written information, such that one is statutorily required while the other is not, should be adequately briefed before a decision is made.* Emphasis added. *Glasgold v. Schweiker*, 558 F. Supp. 129, 151 (E.D.N.Y. 1982).

In the *Ruppert* litigation, as of this date, SSA Commissioner Chater has not yet rendered her *Ruppert* "oral Notice" decision. Thus, when on April 29, 1986 Danielle applied for SSI benefits, the SSA claims representative, if asked, would have been hard pressed to provide an "oral explanation" to Danielle's mother as to what legal standard was to be applied to compute Danielle's benefits. This is because the litigation strategy of Assistant Counsel Banks remained inchoate as applied to a Second Circuit SSI recipient as the *Ruppert* litigation was slowly wending its way through the

Courts because of the implementation of the Secretary's nonacquiescence litigation strategy.

The petitioner argues that the neither the SSA Commissioner or the Second Circuit followed the holding of *Georgetown Hospital*. This is because the SSA Commissioner and the Second Circuit have deferred to the litigation strategy of AAJ Banks who determined that the Second Circuit *Ruppert*, the Seventh Circuit *Jackson*, the Fifth Circuit *Hickman*, and the Ninth Circuit *Ceguerra* decisions were incorrectly decided. Since the *Ruppert* Acquiescence Ruling was not subjected to the rule-making process, SSA Commissioner Chater's standards are based on the litigation strategy of AAJ Banks and the present appellate counsel. As a result, the SSA claims representatives have the ability to "change" the "oral" rules based on the barometer of the success or failure of the latest SSI litigation.

Petitioner Gordon argues that the need of claims representatives to give a *Ruppert I* "oral" explanation as to the method used in computing monthly SSI benefits would be *eliminated* if SSA Commissioner Chater followed the *Georgetown* holding and publicly promulgated a regulation that clearly established the SSI standards. Without a regulation, the standards will always be subject to change based on the litigation strategy of SSA Commissioner's counsel, including AAJ Larry Banks who determined that the Seventh Circuit "incorrectly" decided *Jackson* and the Second Circuit "incorrectly" decided *Ruppert*.

III. THE CASE RAISES IMPORTANT QUESTIONS AS TO EQUAL APPLICATION OF THE LAW AS THE SECOND CIRCUIT DEFERRED TO AAJ BANKS DECISION TO ESTABLISH A *RUPPERT-GORDON* STANDARD THAT INCORPORATED AN "IN-KIND" LOAN THAT WAS REJECTED BY THE FIFTH AND NINTH CIRCUITS IN *HICKMAN* AND *CEGUERRA*.

AAJ Banks February 25, 1992 *Gordon III* standard, interpreting the *Ruppert* Acquiescence Ruling, incorporated the in-kind "loan" standard that was rejected by the Fifth Circuit in *Hickman v. Bowen*, 803 F. 2d 1103 (5th Cir. 1986), the Ninth Circuit in *Ceguerra v. Sullivan*, 933 F. 2d 735 (9th Cir. 1991), and Secretary Sullivan in his own Social Security Ruling which was issued on September 8, 1992 SSR 92-8p when the Secretary rescinded the *Hickman* Acquiescence Ruling.

The ACJ Banks "loan" standard was made at his *Gordon III* Finding # 3:

> For purposes of computing the amount of Federal Supplemental Security income for which the claimant is eligible under terms of the Ruppert Acquiescence Ruling (AR 90-2(2), the claimant is to be charged with the receipt of in-kind income in the amount of the *difference between the amount loaned and the amount of the presumed maximum value of such in-kind. income.* (Emphasis added).

When the Second Circuit affirmed AAJ Banks' standard, the Court did not apply the standard Judge Spatt or AAJ Banks applied. Rather, the Second Circuit took the position that the value of the "loaned" rent was *not* the market value as determined by the Secretary of $ 406 per month, but the 1/3 presumed value amount. The effect of using the presumed value, rather than the market value,

was to diminish the fraction when applying the *Jackson* mathematical test.

If AAJ Banks' February 25,1992 *Gordon III* loan formula had been applied by the Second Circuit, the Court would have had to grapple with the Secretary's determination that the market value of the rent was $406 per month and not the presumed value. Contrary to the Second Circuit's conclusion, it was AAJ Banks who imputed the "loan" of the market value of rent, not Danielle's mother-landlord.

The Second Circuit's *Gordon* decision is now the standard the SSA Commissioner applies to SSI recipients who reside in the Second Circuit. This is notwithstanding the fact that on September 8, 1992, Secretary Sullivan rescinded the *Hickman* Acquiescence Ruling "loan" standard and issued SSR 92-8p. This now means that in the Second Circuit, because AAJ Banks determined that Fifth Circuit and Ninth Circuits had "incorrectly" decided *Hickman* and *Ceguerra*, that Second Circuit SSI recipients with rent subsidies will have a "loan" of the market value rent imputed into the computation of their monthly SSI benefits.

In summary, the appellee respectfully submits that the Court grant the petition because the Second Circuit misapprehended the "loan" standard that was incorporated into AAJ Banks' interpretation of the *Ruppert* Acquiescence Ruling. This is because AAG Banks' *Gordon III* formula was devised prior to Secretary Sullivan's September 8, 1992 decision to rescind the *Hickman* Acquiescence Ruling and to adopt the *Hickman* and *Ceguerra* holdings as the Secretary's policy in all 50 States.

IV. THIS CASES RAISES ISSUES AS TO THE CREDIBILITY OF THE FEDERAL GOVERNMENT WHICH HAS REPEATEDLY CHANGED ITS POSITION AS TO WHETHER *JACKSON* WAS "CORRECTLY" OR "INCORRECTLY" DECIDED.

This case raises disturbing issues as to the credibility of the federal government which over the past decade has been changing its position as to whether *Jackson* was "correctly" or "incorrectly" decided. The appellee argued below that the federal government had determined that *Jackson* was "correctly" decided and should be estopped from arguing, at its litigation whim, that *Jackson* was "incorrectly" decided.

In his October, 1983 *Guigno* Brief, in opposition to the *Glasgold-Rothman-Guigno* appellants petition for a writ of certiorari, Solicitor General Lee advised this Court that *Jackson* was correctly decided. The *Ruppert* Court cited Solicitor General Lee's Brief in its *Ruppert* decision. "Brief for Respondent at 6-7, *Guigno v. Heckler*." *Ruppert*, at p.1179. The *Ruppert* Court discounted the federal government's changing litigation position as mere "shilly-shallying."

However, since Solicitor General Lee had determined that *Jackson* was "correctly" decided, the Secretary's April 21,1986 "*Jackson*" regulation should not have been limited to the Seventh Circuit States. If the regulation had general validity, then it would have been applied to Danielle's April 29, 1986 SSI application. Thus, the Second Circuit's *Gordon* decision merits a closer review as the federal government's shilly shallying has had profound effects as to the creation of two different federal regulatory standards in a program that Congress intended to have one uniform federal standard applied equally in all 50 States.

Notwithstanding Solicitor General Lee's October, 1983 *Guigno* Brief, on April 20, 1984, Deputy Assistant Attorney General Kuhl

determined that *Jackson* was "incorrectly" decided. "Under these circumstances we have no objection to HHS's proposal to limit its proposed rule to Indiana." App. G. Document secured from a FOIA action and was in the Circuit Record.

However, on July 25, 1985 DAAG Kuhl reversed her position and testified before a House Judiciary Subcommittee, that was considering legislation to end the HHS nonacquiescence policy, and advised that the pre-July 25, 1985 nonacquiescence policy would end. Upon the request of Members of Congress to provide a marker list of nonacquiescence cases, DAAG Kuhl did not list *Jackson*. Document in the Circuit Record. App. I.

Notwithstanding DAAG Kuhl's July 25, 1985 sworn Congressional testimony, on April 21, 1986, when the *Jackson* regulation was promulgated, Secretary Bowen followed the legal opinion of Assistant Counsel Larry Banks that *Jackson* was "incorrectly" decided and limited its application to the Seventh Circuit States. However, notwithstanding that limitation, on March 23, 1987, SSA Chief Counsel Donald Gonya advised ACUS that the Secretary had acquiesced to the Circuit Court's decision by promulgating a regulation. However, during the *Ruppert* and *Gordon* litigation, the Secretary's appellate counsel repeatedly and aggressively argued that *Jackson* was "incorrectly" decided.

If this Court grants the *Gordon* petition, Solicitor General Days will have an opportunity to clarify the SSA position as to whether *Jackson* was "correctly" or "incorrectly" decided. If Solicitor General Days reaches the same conclusion as Solicitor General Lee that *Jackson* was "correctly" decided, then this raises the issue whether disinformation had been provided to the Second Circuit in *Gordon* when the federal government argued, contrary to DAAG Kuhl's July 25, 1985 Congressional testimony and Chief Counsel Gonya's March 23, 1987 letter to ACUS, that *Jackson* was "incorrectly" decided and the *Jackson* regulation should continue to be limited to only the Seventh Circuit States.

In summary, the federal government has taken inconsistent litigation positions as to whether *Jackson* was "correctly" or "incorrectly" decided. Since the *Gordon* Court followed, but did not adopt the *Jackson* holding, the *Jackson* decision should be reviewed by this Court with the hindsight legal prism provided by Solicitor General Days as to whether *Jackson* was "correctly" or "incorrectly" decided when applied to the Second Circuit's *Gordon* decision.

CONCLUSION

This case involves important issues of law that affect SSI recipients for whom the SSI program is not being administered equally by SSA Commissioner Chater. If this Court grants the petition, then the Supreme Court will have an opportunity to determine whether the holdings in *Chevron* and *Georgetown Hospital* have been applied to protect the rights of SSI recipients in all 50 States given the 1995 implementation of the nonacquiescence policy of SSA Commissioner Chater and Attorney General Reno by which the SSI regulations are not enforced equally.

Respectfully submitted,

Charles Robert, Esq.
Counsel of Record
Attorney for Petitioner
100 Merrick Road, 508W
Rockville Centre, New York 11570
(516) 766-7700

Dated: December 15, 1995

APPENDICES

APPENDIX A

UNNY 93-Cv-3272 Spatt

United States Court of Appeals

FOR THE
SECOND CIRCUIT

MANDATE
UNITED STATES COURT OF APPEALS
FILED
MAY 22 1995 GEORGE LANGE III, CLERK
SECOND CIRCUIT/stamp

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of May, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE RALPH K. WINTER,
Circuit Judges.

DANIELLE GORDON,

Plaintiff-Appellee,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant-Appellant.

94-6011

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of the District Court is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this

Court with costs to be taxed against the appellee.

GEORGE LANGE III, Clerk
By:
Arthur Heller/signature
Arthur Heller,
Administrative Attorney

A TRUE COPY GEORGE LANGE III, CLERK/stamp
George Lange III/signature

ISSUED AS A MANDATE. 26 SEP 95

APPENDIX B

United States Court of Appeals

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

UNITED STATES COURT OF APPEALS
FILED
SEP 18 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT/stamp

GEORGE LANGE III CLERK/stamp

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, the City of New York, on the 18th day of September, one thousand nine hundred and ninety-five.

Gordon

v

Shalala

Dkt No: 94-6011

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee Danielle Gordon.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereof.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:
Beth J. Meador/signature
Beth J. Meador
Administrative Attorney

p o ccc
inbancdn_frm

APPENDIX C

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 615—August Term 1994

(Argued January 25, 1995 Decided May 22, 1995)

Docket No. 94-6011

DANIELLE GORDON,

Plaintiff-Appellee,

- v. -

DONNA E. SHALALA,
Secretary of Health and Human Services,

Defendant-Appellant.

Before:
LUMBARD, VAN GRAAFEILAND and WINTER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Spatt, J.) reversing the Secretary's reduction of appellee's Supplemental Security Income benefits.

Reversed.

CHARLES ROBERT, Rockville Centre, NY (Robert, Lerner & Bigler, Rockville Centre, NY, of counsel), *for Plaintiff-Appellee.*

BRUCE H. NIMS, Asst. U.S. Atty., Brooklyn, NY (Zachary W. Carter, U.S. Atty., Robert L. Begleiter, Deborah B. Zwany, Asst. U.S. Attys., Brooklyn, NY, Annette H. Blum, Chief Counsel, Kathleen A. Mahoney, Asst. Regional Counsel, Dept. of Health and Human Services, NY, NY, of counsel), *for Defendant-Appellant.*

VAN GRAAFEILAND, *Circuit Judge:*

The Secretary of Health and Human Services appeals from a judgment of the United States District Court for the Eastern District of New York (Spatt, J.) reversing the Secretary's reduction of Danielle Gordon's Supplemental Security Income ("SSI") benefits on the ground that the Secretary applied incorrect legal standards in computing the benefits payable. For the reasons that follow, we reverse.

The SSI program provides benefits to aged, blind, or disabled individuals who meet the statutory income and resource limitations. 42 U.S.C. §§1382 and 1382a; 20 C.F.R. Part 416, Subpart K. A comprehensive discussion of the complicated regulatory framework under which this program operates is contained in *Ruppert v. Bowen*, 871 F.2d 1172, 1174-75 (2d Cir. 1989). For purposes of this opinion, the following summary will suffice. An SSI recipient is paid a flat monthly benefit rate, but the benefits are reduced by the amount of non-excludable income received by the individual. 42 U.S.C. § 1382(b); 20 C.F.R. §§ 416.1100 and 416.1104. Such income is anything that the SSI recipient receives in cash or in kind that can be used to meet his or her needs for food, clothing and shelter, thus obviating, in part at least, the use of SSI funds for these purposes.

20 C.F.R. § 416.1102. In-kind support and maintenance is valued using one of two methods. 20 C.F.R. §416.1130(c). When the recipient lives in the household of another person who provides both food and shelter, the in-kind support and maintenance is valued at one-third of the recipient's federal benefit rate, regardless of its actual value. 20 C.F.R. §416.1131. In other situations, the Social Security Administration ("SSA") presumes that the in-kind income is worth a maximum value that is one-third the recipient's federal benefit rate plus $20 (the general unallocated income exclusion described in 20 C.F.R. § 416.1124(c)(12)). 20 C.F.R. § 416.1140. This presumption can be rebutted by showing that the current market value of the in-kind support minus any payment made for it by the recipient, or the actual amount paid by someone else for the recipient, is lower than the presumed value. *Id.*

In *Ruppert*, this Court held that further analysis is required in calculating SSI benefits. We said there that in order for a recipient's benefits to be reduced because of subsidized support, he or she must receive an "actual economic benefit" from the subsidy. In other words,

> if the proportion of income that [SSI recipients] expend on shelter is so great that "it flies in the face of reality to conclude that 'unearned income' in the form of subsidized shelter . . . is 'actually available' to the recipient," *see Jackson [v. Schweiker]*, 683 F.2d [1076,] 1085 [(7th Cir. 1982)], the unearned income should be disregarded.

Ruppert, 871 F.2d at 1180. Although this Court did not clearly state how this "actual economic benefit" test should be applied, we stated that "[t]he regulations used in the Seventh Circuit might provide a good indication of that, though we do not necessarily require their adoption as a matter of law." *Id.* at 1181.

In *Jackson*, the Seventh Circuit had required the Secretary to modify the SSI regulations so as to "impute unearned income attributable to the receipt of shelter or other basic necessities at prices below 'market value' only to the extent that the unearned income represents additional resources available to the recipient (increased purchasing power) to meet his or her basic needs." 683 F.2d at 1087. The resulting regulation, referred to in *Ruppert*, can be found in 20 C.F.R. § 416.1130(b). In the *Ruppert* Acquiescence Ruling, AR 90-2(2), 55 Fed. Reg. 28,947 (1990), the Secretary decided that, in the Second Circuit, "actual economic benefit" would be determined in the same way:

> SSA has decided that it will determine that an applicant or recipient did not receive an "actual economic benefit" from a rental subsidy when the monthly amount of rent required to be paid equals or exceeds the presumed maximum value described in 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value, whichever is less.

Compare 20 C.F.R. § 416.1130(b) .

Danielle Gordon is a spastic quadriplegic with cognitive impairments. On April 29, 1986, she applied for SSI benefits seeking payments beginning June 1, the month after she would turn 18. In her application, she stated that she resided in her parents' household, received free food and shelter, and made no contributions towards her parents' expenses. In August 1986, the SSA awarded Danielle benefits retroactive to June 1986. However, because Danielle was

living in her parents' household and receiving in-kind support and maintenance from them, the SSA reduced her monthly benefits by one-third pursuant to 20 C.F.R. § 416.1131.

When Danielle turned eighteen in May 1986, she entered into a written agreement with her mother under which she paid her mother $100 per month for "rent" and an additional $ 100 per month for the separately designated purchase of food. Based on this agreement, Danielle requested reconsideration of the SSA's decision, contending that she had rental liability and lived in her own household. The SSA denied the reconsideration request, concluding that Danielle's living arrangements had not changed after she filed her application. It reasoned that, because she was not paying her equal share of the household expenses, she continued to live in the household of another. This decision was affirmed by an administrative law judge and the Appeals Council.

Danielle continued to pursue various avenues of relief, both administrative and legal, but had little success until the promulgation of the Secretary's *Ruppert* Acquiescence Ruling on July 16, 1990. Thereafter, Danielle was awarded higher monthly benefits retroactive for the period from June 1986 through December 1990. However, she did not obtain the full amount of her benefit request. Because Danielle's $100 rent was less than the presumed maximum value, the Appeals Council concluded that she had an "actual economic benefit" each month and reduced her benefits accordingly. The presumed maximum values during the relevant period were the following:

> June to December, 1986—132.00 per month [$112 (one-third of the monthly benefit rate of $336) plus to $20]
>
> January to December, 1987—$133.33 per month [$113.33 (one-third of the monthly benefit rate of $340) plus $20]

January to December, 1988—$138.00 per month [$118 (one-third of the monthly benefit rate of $354) plus $20]

January to December, 1989—$142.66 per month [$122.66 (one-third of the monthly benefit rate of $368) plus $20]

January to November, 1990—$148.66 per month [$128.66 (one-third of the monthly benefit rate of $386) plus $20]

Pursuant to 20 C.F.R. §416.1130(b) and the *Ruppert* Acquiescence Ruling, in-kind support and maintenance was imputed to Danielle in the following amounts (the difference between the $100 per month rent and the presumed maximum value, minus the $20 general monthly income exclusion of 20 C.F.R. § 416.1124(c)(12)):

June to December, 1986	$12.00 per month
January to December, 1987	$13.33 per month
January to December, 1988	$18.00 per month
January to December, 1989	$22.66 per month
January to November, 1990	$28.66 per month

Danielle sought review of the Appeals Council's decision, claiming that the Secretary failed to apply the *Ruppert* standard properly. The district court agreed, believing that it would " 'fly in the face of reality' to conclude that the rent subsidy . . . or even the presumed maximum value . . . was actually available to the plaintiff and thus a[n] economic benefit to her." The court ordered the Secretary to recalculate Danielle's SSI benefits and to reimburse her for the underpayments.

Arguing for affirmance, Danielle contends that under the Ruppert standard, she cannot be said to have received an actual economic benefit from the rental subsidy. She contends that in 1986 she

received monthly SSI benefits of $241 from which she paid $100—or 41%—in rent, leaving her with only $141 per month. She argues that this constitutes such a disproportionate share of income going towards rent that the rental subsidy should be disregarded. She also argues that since the amount of the subsidy—the rental value of the property, $406, less the $100 she paid—exceeded the amount of SSI benefits she received—$241—it "flies in the face of reality" to say that the amount of the rental subsidy was "actually available" to her. The district court agreed with Danielle; we do not.

In *Ruppert*, this Court remanded to the district court to "determine whether the imputed income reflected any 'actual economic benefit.'" 871 F.2d at 1180-81. As mentioned above, we did not articulate any particular method for determining "actual economic benefit." However, we did specifically state that "[t]he regulations used in the Seventh Circuit [i.e., 20 C.F.R. § 416.1130(b)] might provide a good indication." *Id.* at 1181. In acquiescing in *Ruppert*, the Secretary decided to apply those regulations. We cannot say that the Secretary applied an incorrect legal standard. Although we did not require adoption of those regulations as a matter of law, we did suggest that they were reasonable. We now hold that they are acceptable.

Danielle focuses on the wrong details when she argues that a disproportionate share of her income is allocated to shelter. The 41% figure she cites is based on her postreduction income, but examination of Jackson, upon which *Ruppert* is based, shows that the relevant percentage of income is determined using figures "before termination [or here, reduction] of SSI" benefits. *Jackson*, 683 F.2d at 1085 (emphasis in original). Here, the pre-reduction figure—based on the maximum monthly benefit rate for the period in question—is only about 30%. It is not at all clear that 30%—or even 41%—is disproportionate, especially since at least $141 in benefits remained after rent payments. See Jackson, 683 F.2d at 1082 (postreduction figure of 33% considered "not . . . abnormally

large"); *id.* at 1085 n.16 (22% pre- and 38% post- considered "relatively high . . . but not . . . unmanageably large"); *id.* at 1083 (37% pre- and 66% post-considered "not... necessarily unreasonable" where $70 per month remained after rent payments). By comparison, the figures in *Jackson* were 77% before termination, *id.* at 1085, and 106% after the termination of benefits, *id.* at 1081.

In the instant case, it does not "fl[y] in the face of reality to conclude that unearned income in the form of subsidized shelter... is actually available to" plaintiff. *Ruppert*, 871 F.2d at 1180 (internal quotations omitted). The Secretary is not attempting to impute the full amount of the rental subsidy or even the presumed maximum value as income. Instead, the Secretary is imputing an amount ranging between $12 and $28.66 per month, and reducing her benefits by that amount. In other words, she received nearly the maximum monthly benefits. Because we believe that Danielle received an "actual economic benefit" from paying only $100 per month for shelter worth over four times as much, we cannot say that the Secretary's conclusion was erroneous .

Danielle also complains that the Secretary failed to apply the rule of *Hickman v. Bowen*, 803 F.2d 1377, 1381-82 (5th Cir. 1986). The *Hickman* rule is that "in-kind loans" of support and maintenance are not "income" for SSI purposes under 20 C.F.R. § 416.1103(f). That section provides as follows:

> (f) *Proceeds of a loan.* Money you borrow or money you receive as repayment of a loan is not income.... Buying on credit is treated as though you were borrowing money and what you purchase this way is not income.

Since an in-kind loan basically is "buying on credit," the *Hickman* rule is not unreasonable. Danielle is wrong, however, when she argues that we ordered the Secretary to follow the *Hickman* rule in the Second Circuit. Although the district court adopted the rule in

Ruppert, 671 F.Supp.151, 167-68 (E.D.N.Y. 1987), the issue was not before us on appeal, *see* 871 F.2d at 1178. We merely stated that by not reaching the issue,

> we do not mean to invite the Secretary to appeal a similar ruling in a later case or to seek to avoid as to individual claimants the precedential effect of [the district court's] well reasoned opinion in the Eastern District or elsewhere in the Second Circuit.

Id.

In any event, we fail to see how the Secretary acted inconsistently with the *Hickman* rule. Danielle argues that the Appeals Council erroneously counted the in-kind loan of rent she received from her landlord-mother. Her argument is based on her claim that, despite the written lease agreement between her and her mother, there was no in-kind rental subsidy because her mother did not intend the unpaid portion of Danielle's share to be a gift. Rather, there allegedly was an implied agreement that the reasonable value of her necessities would be considered an in-kind loan.

In *Ruppert*, this Court stated that

> [u]nder New York law, an incompetent is liable under an implied agreement for the reasonable value of necessities. Whether a loan existed, then, depends on the families' intent rather than the existence of paper documentation.

871 F.2d at 1178 (citations omitted). However, this does not mean that Danielle's mother is free to assert after the fact the existence of a loan. The issue is whether a loan existed at the time the credit was given, not whether the mother wishes to consider it a loan now. The Appeals Council did not find the rental subsidy to be a loan, and there is no evidence that it was intended as such at the time. Furthermore, the implied contract claim is barred by the existence

of the parties' express agreement on the matter. *Radio Today, Inc. v. Westwood One, Inc.*, 684 F. Supp. 68, 71-72 (S.D.N.Y. 1988) (citing New York case law).

Finally, plaintiff claims that the *Ruppert* Acquiescence Ruling had to have been publicly promulgated pursuant to the Administrative Procedure Act (the "APA") in order to be effective. This argument is frivolous. The general rule on acquiescence rulings is that although they "do not have the force and effect of law, they constitute Social Security Administration interpretations of its own regulations and the statute which it administers. Accordingly, Social Security rulings are entitled to deference except when they are plainly erroneous or inconsistent with the Act." *Walker v. Secretary of Health & Human Services*, 943 F.2d 1257, 1259-60 (10th Cir. 1991) (citations omitted) . This Court, in *White v. Shalala*, 7 F.3d 296 (2d Cir. 1993), dealt with the issue of whether a ruling must be promulgated under the APA. In that case, we said:

> We have previously approached the question of whether a rule is subject to notice and comment requirements by focusing on whether the rule is interpretive or substantive. We articulated this distinction by stating that a substantive rule grants rights, imposes obligations, or produces other significant effects on private interests, while an interpretive rule is an agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities.... The central question is essentially whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act.

Id. at 303 (citations and internal quotations omitted). The *Ruppert* Acquiescence Ruling was interpretive, not substantive. It did not create rights or impose obligations. It merely interpreted this Court's mandate in *Ruppert* to the effect that imputed income must provide the SSI recipient with an "actual economic benefit." It was not subject to the notice and comment requirements of the APA.

The judgment of the district court is reversed and the case is remanded with orders to reinstate the Secretary's determination.

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APPENDIX D

United States District Court

EASTERN DISTRICT OF NEW YORK

DANIELLE GORDON

Plaintiff,

-against-

DONNA E. SHALALA, Secretary
of the Department of Health & Human Services,

Defendant.

United States Courthouse
Uniondale, New York
SS#108-44-0278,
CV 89-412, 90-1183, 93-3272

November 12, 1993
9:30 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE ARTHUR D. SPATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROBERT LERNER & BIGLER, ESQS.
100 Merrick Road Suite 508W
Rockville Center, New York 11570
BY: CHARLES ROBERT, ESQ.

For the Defendant: ZACHARY W. CARTER
United States Attorney
Eastern District of New York
Brooklyn, N.Y. 11201
BY: BRUCE M. NIMS, ESQ.
Assistant United States Attorneys

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE CLERK: Civil cause for motion, CV 93 3272. Gordon versus Shalala.

MR. ROBERT: Charles Robert.

MR. NIMS: Bruce Nims, assistant U.S. Attorney for the Secretary. Your Honor, I don't have much to add to the brief. I think it's very clearly set forth.

THE COURT: I think your brief is very clear. I don't think Mr. Robert's brief is that clear, but I thought yours was very clear. We had to wave through the plaintiff's brief. It's not to the point at all, Mr. Robert. I think you are right, everything is in the papers.

MR. NIMS: I have nothing further to add.

THE COURT: How about you, Mr. Robert?

MR. ROBERT: On the question of the standard the Secretary used, the problem we believe—

THE COURT: You are not going to tell me what is in your papers, are you?

MR. ROBERT: No, your Honor.

THE COURT: These three cases, are they consolidated or what? Is there an 89-412, 90-1183, and 93-7322? Are they all involved in this case?

MR. ROBERT: Yes.

THE COURT: My determination in this case will resolve all three of them?

MR. ROBERT: Yes.

THE COURT: Are they consolidated?

MR. ROBERT: Yes. The first two by stipulation.

THE COURT: Do you agree, Mr. Nims?

MR. NIMS: Yes, your Honor. The third number, the most recent number is only because in the Eastern District they give cases returned from remand a new number for statistical purposes.

THE COURT: I have read the papers. I'm ready to make a ruling.

MR. ROBERT: May I add anything or not?

THE COURT: You want to add something that is not in the papers?

MR. ROBERT: Clarify —

THE COURT: I don't want you to clarify. The subject is too complex for your to clarify it.

This decision disposes of the three cases entitled Gordon against Shalala. I don't know what the previous titles were, if there were different secretaries of health, I assume, under President Bush then there are under President Clinton. The three are all involved.

This case involves whether the United States Secretary of Health and Human Services, the Secretary, appropriately determined that the plaintiff, a disabled 25 years old, who suffers from cerebral palsy with spastic quadriplegia and cognitive impairment received, "in-kind income" benefits in the form of rental subsidies and, therefore, should have a reduced monthly Supplemental Surety Income benefit. The defendant Secretary has moved pursuant to Federal Rule 12(c) for a judgment on the pleadings in her favor.

Now, this regulatory scheme, this whole area is complex, convoluted and difficult to understand. Certainly for me anyway. From what I gather, with regard to the relevant regulations, the regulations promulgated under the Social Security act relevant to this case are the, "in-kind Support and Maintenance Provisions" found at 20 C.F.R. Section 416.1130-1145. The regulations concern when certain "in-kind" benefits such as food, clothing and shelter support by a parent or spouse can be considered income to the recipient, and, therefore, require a reduction in the recipients SSI benefit.

According to 20 United States Code, Section 416.1130 subdivision C, in-kind support is valued in two ways. The first is the "one-third reduction" rule. If the recipient lives "in another person's household," and that person provides food and shelter to the recipient, then one-third of the federal benefit is counted as additional income to the recipient and subtracted from the SSI benefit, no matter what the actual value of the in-kind support is. See 20 United States Code, Section 416.1131 it's the Code of Federal Regulations, C.F.R.

We have to keep these things straight. It's very important that we know all about these things to determine a case like this.

In all other situations, the "free-assumed value rule" applies. Under this evaluation, the dollar value of the in-kind support is presumed to be worth a maximum value calculated at one-third of the federal benefit plus $20.00 dollars in general exclusion charges. However, the recipient can rebut this presumption of evaluation by showing that its in-kind support is not equal to the presumed value. To do this, the recipient makes must show that the actual or current value of his food, clothing or shelter support, minus any payment the recipient makes for them is equal to less than the presumed maximum value. See 20 C.F.R. Section 416.1140.

Under these regulations, if the recipient is in a landlord/tenant relationship, they are considered to be charged rent pursuant to a business arrangement and it's presumed that the rent paid equals the current rental market value.

However, where the landlord is the recipient's parent, this presumption of a business arrangement does not apply, and the difference between the rent paid and the current rental market value is considered as in-kind income, up to the presumed maximum value established under Section 416.1140, namely, one-third of the federal benefit plus $20.00.

The crux of this decision is the Second Circuit decision in Ruppert against Bowen, 871 F. 2d 1172, Second Circuit, 1989. In Ruppert a group of plaintiffs challenged the Secretary's determination under the in-kind support regulations that the difference between the fair market rental value of a SSI recipient's housing and the rent they actually paid is unearned income. Relying in part on the reasoning in Jackson against Schweiker, 683 F. 2d, 1076, Seventh Circuit, 1902, the

Ruppert court by Chief Judge Oaks, held that when the particular facts of a case indicate that the proportion of income the recipient expends on shelter, "is so great that it flies in the fact of reality," to conclude the unearned income in the form of rent subsidy the difference between rental market value and rent paid was "actually available" to the recipient, and the subsidy cannot be counted as income no matter what the relationship between the recipient and the landlord.

According to Rupert the record must indicate, "an actual economic benefit" or real "purchasing power," in order to count the subsidy as in-kind income.

The Second Circuit in Ruppert also let stand as "precedential" the district court's decision in that case that loans, which are not included as income to the recipient under the regulations, can also include in-kind support and maintenance.

Following the Rupert decision, the Social Security Administration published a "Rupert Acquiescence Ruling." In Rupert acquiescence ruling, the SSA refined the "flies in the face of reality" test stated in Ruppert and SSA instructed the officers in the states covered by the Second Circuit, that a recipient will not receive an "actual economic benefit" from rental subsidy "when the monthly amount of the rent required to be paid equals or exceeds the presumed market value described in 20 C.F.R. Section 416. 1140 subdivision (a)(1), namely one-third of the federal benefit rate plus the 20 dollar general income exclusion.

If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the market value, whichever is less."

Briefly the background of this is that the plaintiff filed for SSI benefits on April 29, 1986. On May 4th, 1986 she entered into a written rent agreement with her mother, who was not legally responsible for her. Under the rent agreement the plaintiff paid one hundred dollars a month for rent, and a hundred dollars a month for the separate purchase of food to her landlord mother.

According to the plaintiff this arrangement qualified her for SSI benefits as a person living in "her own household" who had rental liability to a landlord pursuant to Section 416.1142 subdivision (c)(2). The plaintiff was approved for SSI benefits and on August 12, 1986, was awarded monthly benefits of $241.24, retroactively from June 1, 1986. This amount, however, was not the full SSI benefit available to the plaintiff having been reduced by one-third of the monthly benefit because the Secretary determined that the plaintiff resided "in-kind' income in the form of support and maintenance from her parents.

On January 27, 1987 the plaintiff was notified that her monthly benefit beginning in March 1987, would be $243.91 a month, which represented a $113.00 reduction for receiving in-kind food and shelter assistance and not paying her pro-rata share of the household expenses.

She requested reconsideration of this decision, which was denied on May 26, 1987. She appealed to the Secretary's ALJ. Hearings were held, and affirmed on January 22, 1988. She subsequently appealed to the Appeal's Counsel and I'm not going to go through the rest of this. It's all in the record and I'll not belabor the record with all of these interim things.

However, she filed her first complaint in CV 89-412 on February 1, 1989. On March 29, 1989, the Second Circuit decided Ruppert. On appeal at that to the ALJ the plaintiff

raised the point that the Secretary's decision did not acquiesce in the Ruppert manner. A hearing was held affirming the reduction in her benefits. Appeals were then held within the department, to the Secretary, and on July 16, 1990, the Secretary published a Ruppert acquiescence ruling.

Meanwhile the plaintiff filed her second suit, CV 90-1183, on the basis of the Secretary's non-acquiescence with the decision in Ruppert. By stipulation and order dated July 16, 1990 both of the plaintiff's civil actions before this court were consolidated and remanded to the Secretary for further proceeding in light of the Ruppert acquiescence ruling.

The Appeal's Council vacated both of the ALJ decisions, remanded the consolidated claims to another ALJ, "to follow the directives of the recently published Ruppert ruling". A de novo hearing was held on November 13, 1990. At that hearing the plaintiff submitted evidence that her rent payments had increased as of December 1990 two hundred dollars a month and the difference between the rent she paid and the actual pro-rata share, $406.00 was intended to be a loan.

In a decision rendered February 15, 1991, the ALJ made the following findings:

One, that the plaintiff was currently receiving in-kind income in the form of shelter support which under the district court Ruppert decision was considered a bona fide loan and, therefore, not countable income for SSI benefit purposed, Two, that from June 1986 until December 1990, the plaintiff received an in-kind rental subsidy, because, one, applying the Ruppert standard the proportion of money she had paid for rent, 50 percent of her payment to her mother, or one hundred dollars was not so great that it flew in the face of reality to conclude her rent subsidy was actual economic benefit available to her and, two, applying the Secretary's refinement

of the Ruppert standard the one hundred dollars she paid for rent from July 1990, the time of the Ruppert acquiescence ruling, until December of 1990, was not equal to or exceed the maximum presumed value of the benefit to her calculated at $108.67 a month, one-third of the federal benefit rate plus $20.00, and

Third, after December 1990, when the plaintiff began paying two hundred dollars a month in rent, the plaintiff did not receive in-kind support and maintenance because applying the Secretary's refinement of the Ruppert standard her rent did exceed the maximum presumed value of the benefit to her.

The plaintiff objected to the portion of the ALJ's decision dealing with the in-kind rent subsidies from June 1986 until December 1990. That's what is before me now.

The plaintiff argued that, despite the written lease agreement between the plaintiff and her mother, there were no in-kind rental subsidies prior to December 1990, because her mother did not intend for the unpaid portion of the plaintiff's share of rent to be a gift. Moreover, the plaintiff argued she was incompetent and, therefore, under New York law liable under an implied agreement for the reasonable value of her necessities.

This argument was rejected by the Appeals Council, which upheld the findings of the ALJ and determined that pursuant to the Ruppert standard for the months June 1986 and November 1990, the plaintiff did receive economic benefits due to the rent subsidies between $32.00 and $48.60 a month, which were the difference between the rent paid and the maximum value of the income to her, one-third of the SSI benefit plus $20.00 dollars.

Plaintiff now seeks the Court's review of the Appeals Counsel's decision, pursuant to the judicial review provision of the Social Security Act, 42 United States Code, Section 405(g). In essence, the plaintiff claims that the Secretary failed to properly apply the Ruppert standard to the facts in this case.

The defendant Secretary moves pursuant to Federal Rule 12(c) for judgment on the pleadings stating that the parties agree the issue and dispute is one of law, there are no factual issues here and can be decided from the record.

The Secretary says that the Appeals Council did properly follow the Ruppert standard in determining that the rent subsidy was an in-kind economic benefit to the plaintiff. On the other hand the plaintiff argues that the Secretary's contention is abstract and not grounded in reality.

According to the plaintiff the proper standard for determining an economic benefit is the Ruppert decision, not the Ruppert acquiescence ruling by the Secretary.

Plaintiff argues that the Secretary's acquiescence ruling does not follow the Ruppert decision.

Plaintiff argues that she received $241.00 a month, that $100.00 from this benefit was used to pay rent, which constitutes 41 percent of her income, and left her with a purchasing power of $141.00 a month.

Plaintiff says this constitutes the type of disproportionate share of income towards rent that Ruppert had in mind when it formulated its standard for excluding certain in-kind support from income.

Moreover, the plaintiff asserts that it would "fly in the face of reality" to conclude that the amount of rent subsidy, $306.00 was actually available to the plaintiff as an economic benefit. The plaintiff claims the idea of this economic benefit is absurd,

because of the value of the rent subsidy was never realized, since the value of the benefits, $241.00 was less than the subsidy of $306.00.

This is the conclusion of the Court. Federal Rule 12(c) states that if a motion for a judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall treated as one for summary judgment.

Here both parties agree there are no issues of material fact in dispute. Rather, their dispute concerns whether the Secretary properly applied the legal standard under Ruppert against Bowen, in determining that the plaintiff received an economic benefit from her rent subsidies, and, thus was subject to a reduction in SSI benefits.

The Court may set aside the Secretary's determination only if it's based upon legal error. Cruz against Sullivan, 912, F.2d, Second Circuit, 1990. Berry against Schweiker, 675, F.2d, 464, Second Circuit, 1982. The Court agrees with the plaintiff in this case that the Appeals Council of the Department of Health and Human Services of the Secretary's office failed to follow the legal standard enunciated by the Second Circuit in Ruppert.

To this Court it does "fly in the face of reality" to conclude that the rent subsidy of $306.00 or even the presumed maximum of $134.00 per month was actually available to the plaintiff and thus a economic benefit to her. The plaintiff only received $241.00 in benefits. How can could she use the $306.00 rent subsidy? The figures calculated by the Secretary, according to the formula in the Ruppert Acquiescence ruling, as economic benefits to the plaintiff during those months are not grounded in reality. They are just abstract calculations. Their abstractness is underscored by the Secretary's argument that during the months at issue the plaintiff would have been

entitled to a benefit ranging from $324.00 in 1986 to $357.00 in 1990. According to the record—the reality—the plaintiff actually received only $141.00 per month. That was the base figure from which to calculate her real purchasing power.

The Ruppert court emphasized the "actual availability" of the rent subsidy as the basis for determining the actual economic benefit. The situation, the Ruppert court had in mind, was on where the recipient paid such a disproportionate share of income to rent, that it would be absurd to think that the recipient realized an economic benefit from the difference between the market rental price and the rent paid. Here, the plaintiff received $241.00 per month and paid $100.00—41 percent to rent—her remaining purchasing power $141.00 to secure other basic needs belies any notion that plaintiff realized the benefit of either the rent subsidy, $306.00 or the presumed maximum value between $132.00 and $142.00 per month.

The Court concludes that the Secretary's determination of the plaintiff's actual economic benefit was based on an erroneous legal standard. Applying the standard enunciated by the Court in Ruppert in the Second Circuit, the Court finds that the plaintiff's rental subsidy was not actually available to her and, therefore, the in-kind support for rent should be disregarded for the months June 1986 until November 1990.

Accordingly, the Secretary is ordered to recalculate the recipient's SSI benefits and reimburse the plaintiff for any difference in underpayment of benefits.

We'll enter a short form order to that effect.

Thank you very much.

APPENDIX E

(A) support and maintenance furnished in cash or kind, except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1382 of this title shall be reduced by 331/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph, (ii) in the case of any) individual or his eligible spouse who resides in a nonprofit retirement home or similar nonprofit institution, support and maintenance shall not be included to the extent that it is furnished to such individual or such spouse without such institution receiving payment therefor (unless such institution has expressly undertaken an obligation to furnish full support and maintenance to such individual or spouse without any current or future payment therefor) or payment therefor is made by another nonprofit organization, and (iii) support and maintenance shall not be included and the provisions of clause (i) shall not be applicable in the case of any individual (and his eligible spouse, if any) for the period which begins with the month in which such individual (or such individual and his eligible spouse) began to receive support and maintenance while living in a residential facility (including a private household) maintained by another person and ends with the close of the month in which such individual (or such individual and his eligible spouse) ceases to receive support and maintenance while living in such a residential facility (or, if earlier, with the close of the seventeenth month following the month in which such period began), if, not more than 30 days prior to the date on which such individual (or such individual and his eligible spouse) began to receive support and maintenance while living in such a

residential facility, (I) such individual (or such individual and his eligible spouse) were residing in a household maintained by such individual (or by such individual and others) as his or their own home, (II) there occurred within the area in which such household is located (and while such individual, or such individual and his spouse were residing in the household referred to in subclause (I)) a catastrophe on account of which the President declared a major disaster to exist therein for purposes of the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.], and (III) such individual

APPENDIX F

AR 90-2(2) SOCIAL SECURITY REPORTING SERVICE ACQUIESCENCE RULINGS

Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989)—Evaluation of a Rental Subsidy as In-Kind Income for Supplemental Security Income (SSI) Benefit Calculation Purposes—Title XVI of the Social Security Act.

ISSUE:

Whether the Secretary may charge an SSI applicant or recipient who receives a rental subsidy with in-kind income in all cases or whether the Secretary must first determine that the applicant or recipient received an "actual economic benefit" from the rental subsidy.

STATUTE/REGULATION/RULING CITATION:

Sections 1611 and 1612(a)(2) of the Social Security Act (42 U.S.C. Sections 1382 and 1382a); 20 C.F.R. Sections 416.1130, 416.1140, and 416.1141.

CIRCUIT:

Second (Connecticut, New York, Vermont)

Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989)

APPLICABILITY OF RULING:

This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, administrative law judge hearing and Appeals Council).

DESCRIPTION OF CASE:

Multiple SSI recipients filed a joint action challenging the methods used by the Social Security Administration (SSA) to calculate their benefits. This ruling relates to the claims of Rose and Edward Faicco, Cheryl Karnett, and Alan Green, who alleged that the

Secretary's treatment of the difference between the current market rental value of their housing and the rent actually paid for the housing as in-kind income was erroneous.

The facts for the pertinent claims are as follows:

FAICCOS

Rose and Edward Faicco were both over age sixty-five. They rented a house from their daughter. Although the monthly expenses for the house were $951, the Faiccos paid rent of $350 per month, which was reduced to $250 per month when their daughter's variable rate mortgage decreased.

An administrative law judge (ALJ) found that each of the Faiccos was overpaid $262.20 between November 1982 and March 1983. The ALJ found that they had been overpaid either because they had received subsidized rent or, because they did not pay their *pro rata* share of household expenses and therefore lived in their daughter's household. The ALJ also found that they were not without fault in causing the overpayment and that the overpayment could not be waived. This became the final decision of the Secretary and suit was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

KARNETT

Cheryl Karnett, who is mentally retarded and autistic, lived with both her parents. Her mother executed a rental agreement as both Cheryl's agent and her landlord. The rental agreement called for Ms. Karnett to pay her mother rent of $169 per month and food payments of $120 per month.

An ALJ found that Ms. Karnett had unearned income of $36 per month, $11 per month because her room's market value was $180 and $25 per month because of occasional meals provided by her

parents. The ALJ's decision became the final decision of the Secretary. A civil action was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. This decision was appealed to the United States District Court of Appeals for the Second Circuit.

GREEN

Alan Green lived with his parents. Mr. Green and his mother had a written agreement, under which he was to pay her $100 per month in rent and $125 per month for food. There was evidence that his mother stated to SSA that she would have charged a stranger $135 for lodging. An ALJ determined that Mr. Green received in-kind income of $35 per month, the difference between the current market rental value and the rent he agreed to pay. This became the final decision of the Secretary and a civil action was filed. The United States District Court for the Eastern District of New York affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

HOLDING

The United States Court of Appeals for the Second Circuit held that, although the statute and regulations concerning in-kind income and rental subsidies are facially valid, if the proportion of income that an SSI recipient expends on housing is "so great that it flies in the face of reality" to conclude that unearned income in the form of subsidized housing is actually available to the recipient, the unearned income should be disregarded.

The court remanded the subject cases to the district court for a determination of whether any SSI recipients had received an "actual economic benefit" from their rental subsidies. However, the court did not state how "actual economic benefit" is to be established.

STATEMENT AS TO HOW *RUPPERT* DIFFERS FROM SOCIAL SECURITY POLICY:

Under 20 C.F.R. Section 416.1130(b), SSI applicants and recipients are found not to be receiving in-kind support and maintenance in the form of subsidized rent, if they are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly rent required to be paid equals the current market rental value. In situations where the landlord/tenant relationship is other than a parent/child relationship, we presume that the amount of monthly rent required to be paid equals the current market rental value.

When there is a parent/child relationship between landlord and tenant, SSA determines whether a rental subsidy exists. Generally, SSA views any difference between the current market rental value and the actual amount of rent paid as being in-kind income, up to the presumed maximum value established under 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). SSA generally considers this difference to be an "actual economic benefit" to the applicant or recipient.

The Second Circuit's decision in *Ruppert* found that the difference between the current market rental value and the actual rent paid does not always constitute an "actual economic benefit" to the SSI applicant or recipient. The court directed that a determination be made as to whether an applicant or recipient received an "actual economic benefit" from a rental subsidy, before charging the applicant or recipient with in-kind support and maintenance.

EXPLANATION OF HOW SSA WILL APPLY THE DECISION WITHIN THE CIRCUIT:

This Ruling applies only in cases in which the applicant or recipient resides in Connecticut, New York, or Vermont at the time of the determination or decision at any administrative level, i.e., initial, reconsideration, administrative law judge hearing, or Appeals Council.

In cases where SSA determines that an applicant or recipient has received a rental subsidy, SSA will determine whether the applicant or recipient received an "actual economic benefit" from the rental subsidy. If SSA determines that the applicant or recipient received an "actual economic benefit," he or she will be imputed to have received in-kind support and maintenance. If SSA determines that the applicant or recipient did not receive an "actual economic benefit," the rental subsidy will be disregarded for purposes of determining eligibility for and the amount of Supplemental Security Income benefits.

Although the court required there to be a determination of "actual economic benefit" in rental subsidy cases, it did not specify the test to be used in making that determination. SSA Has decided that it will determine that an applicant or recipient did not receive an "actual economic benefit" from a rental subsidy when the monthly amount of rent required to be paid equals or exceeds the presumed maximum value described in 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value, whichever is less.

APPENDIX G

Telephone:
(202) 633-3388

Mr. Milo Sunderhauf
Reports Management Branch
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Re: *Proposed HHS Regulation Modifying SSI In-Kind Income in Indiana*

Dear Mr. Sunderhauf:

This letter responds to your memorandum of April 3, 1984, requesting the views of the Civil Division on a proposed rule entitled "Supplemental Security Income for the Aged, Blind, and Disabled, Subpart ?—Income," which would amend 20 C.F.R. Par. ?. This rule is being proposed by the Department of Health and Human Services in response to *Jackson v. Hackler*, Civ. No. 679-213 (H.D., Ind., Jan. 6, 1984), on remand from *Jackson v. Schweiker*, 603 F.2d 1976 (7th Cir. 1982).

HHS's existing regulations at issue in *Jackson* require that the difference between the fair market rental for housing occupied by an SSI recipient and the rent actually paid by him be treated as in-kind income under certain circumstances. See 20 C.F.R. 416.1130 *et seq*. The Seventh Circuit held that these regulations are invalid in some cases and remanded with instructions that HHS modify its policy and "impute unearned income attributable to the

receipt of shelter or other basic necessities at prices below "market value" only to the extent that the unearned income represents additional resources available to the recipient (increased purchasing power) to protect his or her basic needs." 683 F.2d at 1987. On remand, the district court ordered the Secretary to submit a proposed regulation to affectuate this modification and, after it is approved by the court, to adopt it.

HHS's proposed regulation would amend 20 C.F.R. 416.1130(b) to provide that, in the State of Indiana only, an SSI claimant will not be considered to be receiving in-kind rental income if the rent he actually pays equals or exceeds a specified "presumed maximum value."

Your memorandum requests us to review the proposed rule to ensure that the approach followed by HHS is fully coordinated with us. As your memorandum indicates, the most significant issue raised by the proposed rule is *whether HHS can or should restrict it to Indiana, thereby not acquiescing in the Seventh Circuit's decision in other states.*

Several facts support HHS's approach and lead us to conclude that the geographic restriction is legally valid under the *Jackson* decisions. First, the plaintiff class in *Jackson* is *limited to SSI recipients and applicants in Indiana.* Second, the Seventh Circuit remanded the case with instructions "*to provide relief to affected class members* consistent with [its] opinion." 633 F.2d at 1086. Finally, as the Seventh Circuit acknowledged (683, F.2d at 1079 n.2), *all other courts of appeals that have considered HHS's existing regulations have sustained it.*

We have reviewed the memoranda to the Solicitor General which led to the decision not to petition for certiorari in *Jackson.* They are consistent with defending the old rule and seeking other cases, both in the Seventh Circuit and in other circuits, to attempt to persuade

the courts that *Jackson* was incorrectly decided.[1] Under these circumstances we have no objection to HHS's proposal to limit its proposed rule to Indiana.

Very truly yours,

Carolyn B. Kuhl
Deputy Assistant Attorney General

cc: Mr. Donald Gonya
Assistant General Counsel
Department of Health and Human Services
6401 Security Boulevard
Baltimore, Maryland 21235

[1] The Seventh Circuit based its analysis on its determination that Ms. Jackson spent 77 percent of her income ($145 of $189.40) for rent before her SSI benefits were terminated and after she was terminated, she would be deemed spending 106 percent ($145 actual rent plus $83.13 imputed rent subsidy when here income was $133 cash plus $83.13 imputed income). 683 F.2d at 1080-1081. In fact, those figures are incorrect because Ms. Jackson received a state housing allowance of $100.08 per month in addition to her other income. 683 F.2d at 1077. Thus, her actual out-of-pocket rent was only $44.92, which was 23.7 percent of her income for rent ($44.92 out-of-pocket rent plus $83.13 imputed income). In distinguishing cases which had upheld HHS's rule, the Seventh Circuit indicated these percentages would have been acceptable. 683 F.2d at 1083. Thus, the *Jackson* decisions appears to rest simply upon the Seventh Circuit's mistaken factual impression.

APPENDIX H

March 23, 1987

Elchard L. Revesz
Assistant Professor of Law
New York Universfty School of Law
40 Washington Square
New York, N.Y. 10019

Dear Professor Revesz:

Your February 5, 1987, letter to Terry Coleman, Principal Deputy General Counsel, Department of Health and Human Services, has been referred to me for reply as regards United States Court of Appeals decisions that may be at variance with Social Securitv Administration policy. We welcome the opportunity to cooperate in the study you will be doing for the Administrative Conference of the United States.

As you requested, we are enclosing copies of several materials which describe the policies and procedures the Social Security Administration follows when applying circuit court decisions in its administrative proceedings. These materials include a Notice of Proposed Rulemaking published for public comment by this Department in the Federal Register on January 23, 1987, at 52 Fed. Reg. 2,557, which discusses Social Security Acquiescence Rulings that are issued by the Commissioner of Social Security. Such Rulings explain the manner in which the Social Security : Administration will apply, or acquiesce in, decisions of the United States Courts or Appeals which are inconsistent with its policy. Acquiescence Rulings are available to the public from the Superintendent of Documents, Government Printing Office. The agency periodically announces the issuance or such Rulings by publishing in the Federal Register their titles, the issues with which

they deal, and an explanation of how the agency will apply appellate decisions within the issuing circuit. Twenty six Acquiescence Rulings have been issued to date. (Some examples are enclosed.)

Also enclosed is a copy of Under Secretary Newman's approval of the Social Security Administration's revised acquiescence policy. The approved memorandum from the Acting Commissioner of Social Security, dated January 15, 1986, reflects the agency's current policy. A copy of the agencies administrative instructions (SGPD Bulletin number III-2(86)) to Administrative Law Judges outlining the procedures to be followed when applying circuit court decisions in conflict with Social Security Administration policy is also enclosed.

In addition to your request for the foregoing written materials, you ask the following three questions:

1. Does it matter whether that administrative proceeding will be reviewed ultimately in the circuit that rendered the adverse decision?

2. What is the role of uncertainty over venue?

3. If the agency conducts both rulemaking and adjudication, do different considerations apply to each?

Regarding your first question, an adverse circuit court decision will be applied in the agency' s administrative proceedings in any claims adjudicated within the circuit, unless the administrative proceeding presents a proper case for relitigating the issue involved. As to your second question, there is very little uncertainty of venue concerning individual appeals of final administrative decisions on Social Security claims. Section 205(g) of the Social Security Act, 42 U.S,C. §405(g), provides that reviews of such decisions can be had by the filing of a civil action in the district court of the United States "for the judicial district in which the plaintiff resides" or has

his or her principal place of business or if the person does not reside or have his or her principal place of business within a judicial district, in the United States District Court for the District of Columbia. The vast majority of district court appeals are filed in the district where the plaintiff resides. Also, the majority of Social Security administrative proceedings occur in the state of residence of the claimant.

Concerning your third question, the Social Security Administrators has the authority under title II of the Social Security Act to engage in both rulemaking pursuant to sections 205(a) and 1102, 42 U.S.C. §§405(a) and 1302 , and adjudication pursuable to sections 205(b), 42 U.S.C. §405(b). There are corresponding provisions governing the Supplemental Security Income program established by title XVI of the Social Security Act and Part B of the Black Lung Benefits Act. The application of circuit court case law inconsistent with Social Security Administration policy usually occurs in relation to the agency's adjudicatory function. The Supreme Court has recognized the Social Security Administration as being "probably the largest adjudicative agency in the western world." *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (quotlng J. Mashaw et al., *Social Security Hearings and Appeals*, p. xi (1978)). The breadth of this system naturally complicates the issue of acquiescing in circuit court decisions.

Only occasionally is the rulemaking function involved in the Social Security acquiescence process when, for instance, a court requires the secretary to issue regulations. See, for example, *Pulido v. Heckler*, 758 F.2d 503 (10th Cir. 1985); *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982); *Jackson v. Heckler*, 581 F. Supp. 871 (N.D. Ind, 1984); *Pulido v. Heckler*, 568 F. Supp. 627 (D. Co, 1983). Unless the court's order is reversed or stayed on appeal, the agency, of course, complies with. such a court order,

Thank you for the opportunity to assist you in your study. We have sent an identical letter to Professor Estreicher.

Sincerely,

Donald A. Gonya/signature

Donald A. Gonya
Chief Counsel for Social Security

Enclosures

APPENDIX I

JUDICIAL REVIEW OF AGENCY ACTION: HHS POLICY OF NONACQUIESCENCE

OVERSIGHT HEARING
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS

FIRST SESSION
ON
JUDICIAL REVIEW OF AGENCY ACTION: HHS POLICY
OF NONACQUIESCENCE

JULY 25, 1985

Serial No. 21

Printed for the use of the Committee on the Judiciary
U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1985

The Department of Health and Human Services submitted the attached response to questions asked by the Subcommittee on Administrative Law and Governmental Relations at the July 25, 1985 hearing on the Department's Policy of Nonacquiescence.

1. *You stated in testimony before this Subcommittee that one of the main justifications for the policy of nonacquiescence was to comply with statutory directives that Social Security programs be implemented consistently throughout the nation.*

   In view of this statement, please provide the subcommittee with the number of cases regarding which the Social Security Administration (SSA) has issued a policy of non-acquiescence and which the SSA has subsequently appealed to the appropriate circuit court en banc in order to obtain a more definitive ruling?

   —How many of these cases have been appealed to the Supreme Court in order to obtain a national interpretation of the statute.

   SSA has asked for rehearing by the circuit court *en banc* in 3 cases in which a nonacquiescence ruling was issued—*Boyland v. Califano*, 633 F.2d 430 (6th Cir. 1980); *Campbell v. Secretary of HHS*, 665 F.2d 48 (2d Cir. 1981); and *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982). Rehearing was denied in all three cases.

   The only case SSA has appealed to the Supreme court after issuing a nonacquiescence ruling is *Campbell*. In that case, the Supreme Court reversed the Second Circuit on the government's appeal and upheld the agency policy at issue, 461 U.S. 458 (1983).

2. *Regarding those cases on which SSA has issued a policy of non-acquiescence, how many reflected a disagreement on the point of law involved among the circuits (i.e., intercircuit disagreements)? For each, please cite at least on case in each circuit in disagreement*

Campbell represented a disagreement among the circuits. In its decision in *Campbell*, the Supreme Court stated that it had granted certiorari to resolve the conflict among circuits and noted that every other Court of Appeals addressing the question had upheld the Secretary's use of the grid regulations. *See Heckler v. Campbell*, 461 U.S. 458, 464 n.8, citing *Rivera v. Schweiker*, 684 F.2d 1144 (5th Cir. 1982); *McCoy v. Schweiker*, 683 F.2d 1138 (8th Cir. 1982); *Torres v. Secretary of HHS*, 677 F.2d 167 (1st Cir. 1982); *Santine v. Schweiker*, 676 F.2d 925 (3rd Cir. 1982); *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir., 1982); *Kirk v. Secretary of HHS*, 667 F.2d 524 (6th Cir. 1981) and *Frady v. Harris*, 646 F.2d 143 (4th Cir. 1981).

The only ruling still in effect which our research indicates involves a decision which conflicts with another circuit's decision is *Johnson v. Califano*, 607 F.2d 1178 (6th Cir. 1979) which held that an individual is presumed dead after an absence of 7 years. Decisions upholding the Secretary's policy that an individual is presumed dead after an absence of 7 years only when there is no explanation or reason for the absence contra to *Johnson* are: *Lahr v. Richardson*, 476 F.2d 1088 (7th Cir. 1973); and *Blew v. Richardson*, 484 F.2d 889 (7th Cir. 1973).

3. *For each case which has not been so appealed, please explain the reason for the decision not to appeal.*

In most of the cases which were the subject of a nonacquiescence ruling and which were not appealed, no information is available in our files regarding the reasons for not appealing those decisions. However, we do have information on the following cases:

(1) *Rassussen v. Gardner*, 374 F.2d 589 (10th Cir. 1967) — SSA's policy at issue in that case had been revised such that future cases raising the issue involved would be rare.

(2) *Boyland v. Califano*, 633 F.2d 430 (6th Cir. 1980) — SSA's regulations on this issue had been revised in 1979 but were not applied in this case because it arose prior to the effective date of the regulations. As a result of this regulatory change, SSA anticipated the Court's decision would have minimal impact and, thus, certiorari was inappropriate.

(3) *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982) — HHS recommended that a petition of certiorari be filed in this case but the Solicitor General declined to file a petition for certiorari.

(4) *Levings v. Califano*, 604 F.2d 591 (8th Cir. 1979) — SSA published new regulations which clarified its policy that "inmate" means the same as "resident," thus restricting the scope of the decision. Furthermore, there was no clear split in the circuits on the issue presented in *Levings*, such that the Supreme Court might grant a petition for certiorari.

4. *Pursuant to the revised policy of nonacquiescence, what directions has SSA sent to branch and district offices to advise employees of the revised policy? Please provide a copy of any such directions to the subcommittee.*

We have sent a copy of the Secretary's June 3, 1985 press announcement (copy attached) of the new acquiescence policy to all district and branch offices. We are also developing instructions for district and branch office employee on the new acquiescence policy and will send you

a copy when it is available. See the response to question 5 for the instructions sent to employees of our Office of Hearings and Appeals.

HHS NEWS
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES/letterhead

FOR IMMEDIATE RELEASE James Brown — (301) 594-2200
Monday, June 3, 1985 (Home) — (301) 498-2148

HHS Secretary Margaret M. Heckler today announced a major change in the way the Social Security Administration responds to United States Court of Appeals decisions affecting its Social Security and Supplemental Security Income programs.

"Our new approach will reconcile, to the maximum extent possible, the congressional requirement for uniform standards and the need to abide by judicial precedents with which we disagree," Secretary Heckler said.

Since the inception of the Social Security programs, the Congress has issued a plain mandate to implement those programs uniformly across the nation, and the Social Security Administrative has complied.

From time to time, however, Court of Appeals decisions have interpreted the law differently than the administration's view, creating a conflict with the principle of national uniformity. For many years, SSA has followed the practice of routinely not applying circuit court's interpretation beyond the decision in the particular case so as to maintain that national uniformity.

Recognizing the practical and legal difficulties occasioned by circuit court decisions in different sections of the country, Secretary Heckler has, after careful study, revised the department's operating practice so that while the basic integrity of uniform standards is maintained, circuit court of appeals decisions are indeed honored.

The new HHS/Social Security Administration policy will work as follows:

The Appeals Council of SSA will generally follow the precedent of a court of appeals within the circuit, with relevant guidance being issued to Social Security administrative law judges. The new procedure will permit relitigation of certain issues in selected cases.

The Appeals Council of SSA and a new special Policy Review Committee established by SSA will review policy issues in situations where a circuit court disagreed with the department's policies to ensure that HHS' positions are correct and equitable.

Where the review committee determines a need for change in policy, prompt action will be taken through revised regulations or instructions as appropriate. If needed, legislative action will be sought.

The committee will also work closely with the department's office of the General Counsel and the Department of Justice to identify the policy issues where it is believed the issue should be relitigated.

Today's changes are the latest in a long series of corrective steps initiated by HHS to ensure that its programs are administered fairly and compassionately.

(2)

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-955

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIELLE GORDON, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

16 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the method by which the Secretary of Health and Human Services (now the Commissioner of Social Security) computed the amount of in-kind rental income chargeable to petitioner, a Supplemental Security Income (SSI) recipient.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-955

DANIELLE GORDON, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A15) is reported at 55 F.3d 101. The order of the court

[1] Section 105(a)(1) of the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1472, transferred the functions of the Secretary of Health and Human Services "with respect to or in support of the programs and activities the administration of which is vested in the Social Security Administration" to the Commissioner of Social Security, effective March 31, 1995. Under Section 106(d) of the Act, 108 Stat. 1477, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the respondent in this action.

of appeals denying rehearing (Pet. App. A3-A4) is unreported. The opinion of the district court (Pet. App. A16-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for rehearing was denied on September 18, 1995. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Supplemental Security Income (SSI) program "provide[s] supplemental security income to individuals who have attained age 65 or are blind or disabled." 42 U.S.C. 1381. A person's eligibility is determined on the basis of her income and resources. 42 U.S.C. 1382(a); see 42 U.S.C. 1382a (defining income and exclusions from income); 42 U.S.C. 1382b (defining exclusions from resources). An eligible recipient receives a flat monthly benefit, which is reduced by the amount of the recipient's non-excluded income. 42 U.S.C. 1382(b). Non-excluded income may take the form not only of cash but also of things or services received in kind that can be used to meet the recipient's needs for food, clothing, and shelter. 20 C.F.R. 416.1102.

In determining the value of in-kind income for purposes of calculating the amount of benefits, the Social Security Administration values unearned in-kind income at its current market value, except when that income takes the form of "in-kind support and maintenance"—*i.e.*, food, clothing, or shelter. 20 C.F.R. 416.1123(c), 416.1130(a). If the recipient lives in the household of another person who provides the

recipient with food and shelter, the in-kind support and maintenance is valued at one-third of the recipient's total SSI benefit entitlement, before exclusions. 20 C.F.R. 416.1131. Otherwise, the Secretary employs a "presumed value rule," under which the in-kind support and maintenance is presumed to have a maximum value of one-third of the benefit rate plus the SSI program's general income exclusion of $20. A recipient may rebut that presumption by showing that either (i) the current market value of the in-kind support and maintenance minus the amount paid for it by the SSI recipient, or (ii) the actual amount paid for it by the donor, is lower than the presumed value. If the presumption is rebutted, SSI benefits are reduced by the amount shown to be the value of the in-kind support and maintenance. 20 C.F.R. 416.1140.

The Secretary has also addressed the situation where there is a parent-child relationship between landlord and tenant and where the landlord charges the recipient-tenant less than the fair market value for rent. In that situation, a "rental subsidy" exists, and under the regulations that subsidy qualifies as in-kind support and maintenance. If, however, the rent paid by the recipient equals the current market rental value that would be paid under an arm's-length "business arrangement," the recipient is not considered to be receiving in-kind support and maintenance. 20 C.F.R. 416.1130(b).

The regulation defining in-kind income, 20 C.F.R. 416.1130, contains a slightly different rule for recipients living in States within the Seventh Circuit. That rule was promulgated as a result of that circuit's decision in *Jackson* v. *Schweiker*, 683 F.2d 1076 (1982). Under the Secretary's "*Jackson* regulation," a recipient is deemed to have a "business arrangement"

if she is paying rent equal to or exceeding the presumed maximum value computed in the manner described above—*i.e.*, rent that exceeds one-third of the value of the recipient's overall SSI monthly entitlement plus $20. Under the *Jackson* regulation, if the actual rent paid by the recipient is below the presumed maximum value, the difference between the actual rent and the presumed maximum value (or the current market value, whichever is less) is imputed as in-kind support and maintenance. *Ibid.*

The formula contained in the *Jackson* regulation is also used in the Second Circuit, within which this case arises. In *Ruppert* v. *Bowen*, 871 F.2d 1172, 1180-1181 (1989), the Second Circuit held that an SSI recipient may be charged with receiving in-kind support and maintenance in the form of a rental subsidy only where she has received an "actual economic benefit" from the subsidy. Following *Ruppert*, the Secretary issued Acquiescence Ruling 90-2(2), 55 Fed. Reg. 28,947 (1990), which accepted the circuit's "actual economic benefit" rule for SSI recipients living in the States within the Second Circuit. The Secretary stated that, as under the *Jackson* regulation, only where an SSI recipient in one of those States paid rent that was below the presumed maximum value of one-third of the SSI entitlement plus $20, would that recipient be deemed to have received an actual economic benefit. In such an instance, the difference between the actual rent and the presumed maximum value or the current market value (whichever is less) would be imputed as in-kind support and maintenance. See 55 Fed. Reg. 28,949 (1990).

2. Petitioner is a disabled adult who lives with her parents. Between June 1986, when she began receiving SSI benefits, and December 1990, petitioner

paid $100 to her parents each month for rent and another $100 each month for food. Pet. App. A8-A9. In December 1990, she increased her monthly rent payment to $200. *Id.* at A23. When petitioner's application for SSI benefits was approved in 1986, the Social Security Administration determined that she was living in her parents' household and was receiving in-kind support and maintenance from them. Accordingly, it reduced her benefits, valuing the in-kind income at one-third of her monthly entitlement. *Id.* at A22. Following various administrative appeals and two actions filed by petitioner in district court, the parties entered into a stipulation consolidating and remanding the actions to the Secretary, in light of the Secretary's post-*Ruppert* Acquiescence Ruling. *Id.* at A23.

On remand, an administrative law judge (ALJ) found that, before December 1990, petitioner had received in-kind support and maintenance from her parents in the form of a rental subsidy, and that as a result petitioner was chargeable with $108.67 in income each month—the amount by which her $100 rent was exceeded by the presumed value of the shelter and food she had received. Pet. App. A23-A24. However, the ALJ held, with the increase in petitioner's rent payment in December 1990, she was no longer receiving in-kind support and maintenance under the Acquiescence Ruling formula, because the rent she paid was no longer below the presumed value. *Id.* at A24.

The SSA's Appeals Council substantially affirmed the ALJ's decision. It modified the amount of in-kind income chargeable to petitioner between June 1986 and November 1990, holding that petitioner had received in-kind monthly income ranging between $12

and $28.66 during that period. Those figures represented the difference between the $100 monthly rent paid by petitioner during that period and the presumed value of the shelter and food she received. Pet. App. A10. That ruling became the final decision of the Secretary.

3. Petitioner then filed this action in federal district court, seeking review of the Secretary's decision. The district court granted summary judgment to petitioner. See Pet. App. A16-A27. It held that the Secretary had misapplied *Ruppert*, because the figures used to calculate the value of petitioner's rental subsidy were "not grounded in reality," but were "just abstract calculations." *Id.* at A26. Because petitioner received $241 per month in SSI benefits and paid $100 per month to her parents for shelter, the court noted, she was left with $141 for other basic needs. *Id.* at A27. In the court's view, petitioner's "remaining purchasing power [of] $141.00 to secure other basic needs belies any notion that [petitioner] realized the benefit of either" her parents' rent subsidy or the presumed value of that subsidy. *Id.* at A27.

4. The court of appeals reversed. Pet. App. A5-A15. It held that the Secretary had used an "acceptable" legal standard in applying Acquiescence Ruling 90-2(2), which had adopted, for cases arising within the States comprising the Second Circuit, the *Jackson* regulation applicable in the Seventh Circuit. Pet. App. A11. The court noted that, in *Ruppert*, it had "not require[d] adoption of those [*Jackson*] regulations as a matter of law, [but had] suggest[ed] that they were reasonable." *Ibid.*

The court of appeals also rejected the district court's holding that petitioner's rental subsidy was

not "actually available." Pet. App. A11. The court noted that petitioner's monthly $100 payment to her parents represented only about 30% of her pre-reduction SSI entitlement, and only about 41% of her post-reduction SSI entitlement. *Ibid.*[2] Moreover, the court noted, the Secretary was not imputing the full rental subsidy to petitioner but only between $12 and $28.66 per month—the amount by which her benefits had been reduced. *Id.* at A12. Petitioner thus received "nearly the maximum monthly benefits," and had "received an 'actual economic benefit' from paying only $100 per month for shelter worth over four times as much." *Ibid.* The court of appeals also rejected petitioner's claims that the rental subsidy had in fact represented not income but a loan to petitioner from her parents, and that the Acquiescence Ruling should have been issued by notice and comment rulemaking under the Administrative Procedure Act. Pet. App. A12-A15.

DISCUSSION

Petitioner challenges the court of appeals' holding that she was correctly charged with receiving between $12 and $28.66 per month in in-kind income in the form of shelter and food between June 1986 and November 1990. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The central issue in the court of appeals was whether the Secretary, in Acquiescence Ruling 90-2(2), had correctly applied the test set forth in

---

[2] By contrast, the court noted, the SSI recipient in *Jackson* had to spend 77% of her pre-reduction income on shelter and 106% of her post-reduction income on shelter. Pet. App. A12.

Ruppert v. *Bowen*, 871 F.2d 1172 (2d Cir. 1989), for computing the amount of in-kind rental income chargeable to an SSI recipient. The court of appeals correctly held that the Secretary had properly applied that test. In *Ruppert*, the Second Circuit held that if the proportion of income that an SSI recipient spends on shelter is so great that "'it flies in the face of reality to conclude that [a rent subsidy] is "actually available" to the recipient,' the unearned income should be disregarded." 871 F.2d at 1180 (quoting *Jackson*, 683 F.2d at 1085) (internal quotation marks omitted). In other words, in-kind income cannot be imputed to a recipient unless it reflects some "actual economic benefit." 871 F.2d at 1180-1181 (quoting *Rothman* v. *Schweiker*, 706 F.2d 407, 410 (2d Cir.) (per curiam), cert. denied, 464 U.S. 984 (1983)).

In the Acquiescence Ruling, the Secretary set out the approach by which it would be determined whether a recipient had received an "actual economic benefit." The Acquiescence Ruling stated that it is realistic to expect an SSI recipient to apply roughly one-third of her benefits toward rent, and that if she pays less than that amount, she is deemed to have received a benefit by having additional funds available for other needs. That is the same formula endorsed by the Seventh Circuit in *Jackson*. As the decision below recognized, *Ruppert* approved of (but did not mandate) use of the *Jackson* formula. It stated: "The regulations used in the Seventh Circuit might provide a good indication of [actual economic benefit], though we do not necessarily require their adoption as a matter of law." Pet. App. A7 (quoting 871 F.2d at 1181). Because "actual economic benefit" under the Acquiescence Ruling "would be determined in the same way" as in the *Jackson* regulation, Pet. App. A8,

the court below properly held that the Acquiescence Ruling was consistent with *Ruppert*. Indeed, petitioner concedes that the decision below "follows" *Jackson*. Pet. 24.

2. Petitioner also asserts that the decision below conflicts with two decisions of this Court. Petitioner's claims lack merit.

a. First, petitioner argues (Pet. 10-16) that the decision conflicts with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner's argument appears to be that the court of appeals erred in deferring to the Secretary, because the Secretary's Acquiescence Ruling had not been promulgated through notice-and-comment rulemaking under the Administrative Procedure Act. See, *e.g.*, Pet. 11, 12.

The court of appeals correctly rejected that argument as "frivolous." Pet. App. A14. The court noted that Acquiescence Rulings are simply the agency's "interpretations of its own regulations and the statute which it administers," and are therefore "entitled to deference except when they are plainly erroneous or inconsistent with the Act." *Ibid.* (citation omitted); see *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994). Moreover, because the Acquiescence Ruling here was interpretive, not substantive, it created no rights or obligations; instead, it "merely interpreted [the Second Circuit's] mandate in *Ruppert*" and "was not subject to the notice and comment requirements of the APA." Pet. App. A15.

b. Petitioner also asserts (Pet. 16-19) that the decision below conflicts with *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). In *Georgetown*, the Court stated that it would not defer to an interpretation

offered by "appellate counsel" when "the agency itself has articulated no position on the question." *Id.* at 212. Petitioner claims (Pet. 16) that the court of appeals in this case "deferred not to the Secretary's regulation, but to the Secretary's counsel's litigation strategy not to seek a regulatory amendment to clarify for the public the Secretary's substantive 'in-kind' income rule that was to be applied in the Second Circuit."

Petitioner is mistaken. In *Georgetown*, the Court addressed the situation in which appellate counsel seeks to provide an interpretation of a regulation on behalf of the agency on judicial review of an agency decision, when the agency itself had not previously adopted that interpretation. In this case, however, the Secretary has previously issued an interpretation of the pertinent regulations in the Acquiescence Ruling. Thus, the concerns expressed in *Georgetown* are inapplicable, and the court of appeals was correct to defer to the Secretary's interpretations of her own regulations.

3. Petitioner next contends (Pet. 20-21) that the decision below conflicts with the approach taken in two other circuits with regard to the situation in which an SSI recipient is loaned in-kind benefits. See *Hickman* v. *Bowen*, 803 F.2d 1377 (5th Cir. 1986); *Ceguerra* v. *Secretary of Health and Human Services*, 933 F.2d 735 (9th Cir. 1991). Petitioner is mistaken. As the court of appeals in this case noted (Pet. App. A12), *Hickman* and *Ceguerra* hold that "'in-kind loans' of support and maintenance are not 'income'" attributable to the SSI recipient in computing benefits. The Secretary has adopted the same rule in Social Security Ruling 92-8p, 57 Fed Reg.

40,919 (1992).[3] The court of appeals in this case acknowledged the "*Hickman* rule," see Pet. App. A12, but it found that rule to be inapplicable because the SSA Appeals Council "did not find [petitioner's] rental subsidy to be a loan, and there is no evidence that it was intended as such at the time." *Id.* at A13. The court rejected petitioner's claim that she presently intends to treat the in-kind subsidy as a loan, noting that the relevant issue is "whether a loan existed at the time [that the rent subsidy was made], not whether [petitioner's] mother wishes to consider it a loan now." *Ibid.* The court of appeals' resolution of that fact-bound issue does not warrant further review.

4. Petitioner finally claims (Pet. 22-24) that review is warranted because the Secretary has taken conflicting positions over time as to whether the Seventh Circuit, in 1982, correctly decided *Jackson*. That question is not presented by this case. Petitioner endorses *Jackson* and concedes (Pet. 24) that the court below "followed" *Jackson*, and there is no dispute that both the portion of the Secretary's regulation governing the Seventh Circuit and her Acquiescence Ruling governing the States comprising the Second Circuit adopt the approach taken in *Jackson*.[4]

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[3] That Ruling abrogated an earlier Ruling and prospectively applied nationwide the principles set forth in *Hickman* and *Ceguerra*. See 57 Fed. Reg. 40,919 (1992).

[4] Petitioner's discussion of the Acquiescence Ruling manifests a misunderstanding of such rulings. In issuing those rulings, the Commissioner has chosen to acquiesce in adverse court of appeals decisions within the respective circuits, instead of seeking review of those decisions in this Court. That practice, however, in no way obligates the Comissioner to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys

FEBRUARY 1996

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change her administration of the Act in cases involving other litigants in *other* circuits that have not rejected her legal position on a particular issue. See *e.g., United States* v. *Mendoza*, 464 U.S. 154 (1984).